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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner,*

v.

ALFRED ARTHUR SANDOVAL, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. In *Lindh v. Murphy*, this Court held that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") did not apply to cases pending on the date of enactment, April 24, 1996. 521 U.S. 320, 326-27 (1997). Did Sandoval, who filed his first federal habeas corpus petition on July 1, 1996, commence a "pending case" -- thereby defeating AEDPA's application -- simply by requesting appointment of counsel and a stay of execution prior to the enactment of the statute?

2. Was the authority of this Court sufficiently clear, under AEDPA's standard of review, to permit federal habeas corpus relief on a claim that a trial prosecutor unconstitutionally referred to the Bible during the penalty phase argument of a capital case?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Arthur Calderon, Warden of the California State Prison at San Quentin ("the Warden"), respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals appears at Appendix L to the petition and is reported at 241 F.3d 765 (9th Cir. 2001). The original opinion appears at Appendix K and is reported at 231 F.3d 1140 (9th Cir. 2000).

The unreported orders of the United States District Court granting in part, and denying in part, relief appear at Appendix

J to the petition. The California Supreme Court's opinion denying relief on this issue appears at Appendix D and was reported at 4 Cal. 4th 155 (1992).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued an amended opinion on February 21, 2001. This Petition for Writ of Certiorari follows within 90 days. The Warden invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE

In the early morning hours of October 14, 1984, Sandoval shot and killed Anthony Aceves and Gilbert Martinez in East Los Angeles' Belvedere Park. During the incident, Sandoval

attempted to murder a third man, Manuel Torres, whom he shot, non-fatally, in the neck. Around 12:45 a.m., October 31, 1984, Sandoval shot and killed Ray Wells in the victim's living room. Sandoval apparently believed Wells had helped the police locate a car used to flee from the scene of the Belvedere Park shootings. Inside the Wells home, Sandoval also shot to death Ray Wells' wife, Marlene. He later explained the Wells murders to a fellow gang member: "Bennie, I just did the big mouth in." He added, "You know I take care of business. I had to do [Marlene], too," because she had witnessed the killing of her husband.

A Los Angeles County Superior Court jury convicted Sandoval as charged of four counts of murder and one count of attempted murder. The jury further found true the special circumstance allegations that Sandoval committed multiple murder. Appendix A. The jury returned a death verdict as to count IV, the murder of Marlene Wells; it, however, elected to spare Sandoval's life as to the other three murder counts. Appendix B. The trial court sentenced Sandoval to death on count IV, to imprisonment for life without the possibility of parole as to the three remaining murder counts, and to twelve years in prison for the attempted murder. The court stayed the prison sentences pending Sandoval's execution. Appendix C.

The California Supreme Court affirmed Sandoval's conviction and sentence in a published decision following an automatic appeal. Appendix D, *People v. Sandoval*, 4 Cal. 4th 155, 14 Cal. Rptr. 2d 342, 841 P.2d 862 (1992). The court found, inter alia, that the trial prosecutor committed misconduct by paraphrasing Romans 13:1-7 during his penalty phase argument. *Id.* at 86-87. The court, however, held the error harmless beyond a reasonable doubt. *Id.* at 88. In support of its ruling that the death verdict resulted from rational decision making, the court noted the jury's lengthy and contemplative penalty phase deliberations. The court also took note of the jury's selective verdict, which condemned Sandoval only for the murder of Marlene Wells. *Id.* The court subsequently denied

without comment a petition for writ of habeas corpus filed by Sandoval. Appendix N.

On September 28, 1993, this Court granted Sandoval's petition for certiorari to consider whether he "[was] deprived of due process and a fair jury trial by the use of California's reasonable doubt instruction." *Sandoval v. California*, 509 U.S. 954 (1993). On March 22, 1994, this Court affirmed Sandoval's conviction and upheld the reasonable doubt instruction in a published opinion reporting two consolidated cases. Appendix E, *Victor v. Nebraska*, 511 U.S. 1, 23 (1994).

On December 7, 1994, Sandoval filed a request for appointment of counsel and a stay of execution in the United States District Court for the Central District of California. Appendix F. The same day, the district court issued a Notice of Filing Death Penalty Habeas Corpus Petition and granted an Order Staying Execution. Appendix G.

On July 1, 1996, Sandoval filed a Petition for Writ of Habeas Corpus in the district court. Appendix H. On July 29, 1996, he filed an Amended Petition. Appendix I. The district court entered an order finding the Amended Petition partially unexhausted and holding federal proceedings in abeyance pending exhaustion. Sandoval filed a second petition for writ of habeas corpus in the California Supreme Court, but the district court sua sponte lifted its abeyance order before the termination of the state court litigation. The state court denied Sandoval's second habeas petition after the district court had granted a motion striking unexhausted claims from the federal petition. Appendices J, N.

The district court disposed of several claims in the Amended Petition on the Warden's first Motion for Judgment on the Pleadings. Appendix J. Later, the court granted the Warden's Motion for Summary Judgment as to several other claims. Appendix J. The district court held an evidentiary hearing to consider whether Sandoval's trial attorneys had provided ineffective assistance in presenting self-defense evidence. The court entered a final order rejecting the

ineffectiveness claim and disposing of several other issues -- including a challenge to the constitutionality of the prosecutor's penalty phase argument -- on the Warden's second Motion for Judgment on the Pleadings. Appendix. J. The court did, however, grant relief on a single claim, which concerned the misjoinder of counts. As a result, it vacated the conviction and concomitant death sentence for count IV. Appendix J.

The Warden appealed, and Sandoval cross-appealed to the United States Court of Appeals for the Ninth Circuit. In a published decision, the Court of Appeals reversed in part and affirmed in part the judgment of the district court after declining to apply AEDPA. Appendix K, *Sandoval v. Calderon*, 231 F.3d 1140 (9th Cir. 2000). The court reinstated the conviction for count IV but vacated the judgment of death, finding the prosecutor's argument prejudiced the penalty verdict. In all other respects the court upheld the denial of habeas relief over a dissent that called for a remand to the district court for evidentiary proceedings concerning Sandoval's waiver of his right to self-representation. Appendix K. On February 21, 2001, the Court of Appeals issued an amended opinion that modified aspects of its reasoning but not its judgment. Appendix L, *Sandoval v. Calderon*, 241 F.3d 765. The court granted the Warden's unopposed motion to stay the mandate pending the filing of this Petition for Writ of Certiorari. Appendix M.

REASONS FOR GRANTING THE WRIT

I.

BY APPLYING PRE-AEDPA LAW TO THIS CASE, THE NINTH CIRCUIT REINFORCED A CONTINENTAL DIVIDE THAT SPLITS THE NATION IN ITS APPLICATION OF HABEAS LAW TO DEATH ROW INMATES

On April 24, 1996, President Clinton signed into effect the Antiterrorism and Effective Death Penalty Act of 1996. On July 1, 1996, Sandoval filed his first federal petition for writ of habeas corpus in the United States District Court for the Central District of California, having sought and obtained appointed counsel prior to AEDPA's enactment. The year after Sandoval filed his petition, this Court ruled that AEDPA did not apply retroactively to cases pending on the effective date of the statute. *Lindh v. Murphy*, 521 U.S. at 326-27. Relying on *Lindh*, a three-judge panel of the Ninth Circuit Court of Appeals held that the filing of a petition for writ of habeas corpus, not a request for counsel, instituted a case for purposes of applying AEDPA. *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283 (9th Cir. 1997) *cert. denied* 118 S. Ct. 1389. In 1998, the Ninth Circuit, sitting en banc, overruled *Beeler*, and held that a "case" began for purposes of applying AEDPA with requests for counsel and a stay of execution. *Calderon v. United States District Court (Kelly (V))*, 163 F.3d 530, 539-40 (9th Cir. 1998).

The Warden respectfully submits that the Ninth Circuit erred in its *Kelly (V)* decision, and therefore erred again, in applying the doctrine in this case. "Cases pending" – the term *Lindh* used to describe habeas matters excluded from AEDPA's reach – plainly refers to ongoing lawsuits. The Ninth Circuit's analysis did not contemplate this fact; instead it equated preliminary judicial decisions -- ones that do not even guarantee

the filing of a habeas petition -- with pending habeas cases. The court's reliance on preliminary motions for stay and appointment of counsel begs an important question – whether the denial of such applications would nonetheless create pending habeas cases.

That point aside, a straightforward interpretation of Supreme Court authority inexorably leads to the conclusion that AEDPA should apply to Sandoval's case. In *McFarland v. Scott*, this Court held that if a capital defendant invokes his federal statutory right to appointed counsel, he has a "post-conviction proceeding" pending. 512 U.S. 849, 856-59 (1994). As a consequence, a condemned state inmate need not file a habeas petition before a federal court stays his execution. *See id. McFarland*, however, recognized that neither § 2254 nor the rules governing federal habeas corpus explain how to commence a habeas proceeding. *See id.* at 854. While the opinion allows for the appointment of counsel prior to the filing of a formal petition, "*McFarland* does not hold that appointment of counsel also commences a post conviction proceeding within the meaning of § 2254." *Moore v. Gibson*, 195 F.3d 1152, 1162-63 (10th Cir. 1999), *citing Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1997).

Recognizing the limited reach of *McFarland*, four circuits have determined that an application for the appointment of counsel does not commence a § 2254 action. *Moore v. Gibson*, 195 F.3d at 1162-63; *Gosier v. Welborn*, 175 F.3d 504, 506 (7th Cir. 1999); *Williams v. Coyle*, 167 F.3d 1036, 1039-40 (6th Cir. 1999); *Nobles v. Johnson*, 127 F.3d 409, 413-14 (5th Cir. 1997), *cert. denied*, 523 U.S. 1139 (1998). In contrast, only the Ninth Circuit has held that a request for the appointment of counsel begins a case for purposes of § 2254. *See Kelly (V)*, 163 F.3d at 539-40.

Not only does *Kelly (V)* stretch the meaning of *McFarland*, it also reflects an erroneous interpretation of its own principal authority, *Hohn v. United States*, 524 U.S. 236 (1998). *See* 163 F.3d at 539-40. *Hohn* held that an application for a certificate

of appealability constituted a "case," the denial of which this Court could review under 28 U.S.C. § 1254(1). *See* 524 U.S. at 241-42. *Hohn* in turn relied on an opinion that found appealable a district court's denial of a request for leave to file a habeas petition. 524 U.S. at 246, *citing Ex parte Quirin*, 317 U.S. 1, 24 (1942). These limited rulings do not compel the conclusion *Kelly (V)* attributes to them. Simply put, *Hohn* and *Quirin* define the jurisdiction of reviewing courts, not the existence of "cases" in the lower courts. *Moore v. Gibson*, 195 F.3d at 1163, *citing Williams v. Coyle*, 167 F.3d at 1040; *see also Kelly (V)*, 163 F.3d at 545 (Hall, J., dissenting) (distinguishing *Hohn*'s use of the word "case" to interpret Supreme Court jurisdiction from its use in AEDPA).

The error of *Kelly (V)* critically divided the country. Apart from the *Kelly (V)* court, no other federal appellate tribunal has concluded that a request for counsel by a death row inmate commences a case for purposes of AEDPA's application. Of course, only state inmates facing a death sentence enjoy a statutory right to counsel. 21 U.S.C. § 848. Accordingly, the *Kelly (V)* decision directly implicates only capital habeas matters and necessarily divided the nation's federal courts in their treatment of the most sensitive of litigation – collateral review of state death judgments.

Toward the end of fairness and the national uniformity of law, this Court should not permit justice to the condemned to differ fundamentally among the various judicial circuits. As Justice Van Devanter explained to Congress seventy-seven years ago, "The prime consideration in the exercise of discretionary jurisdiction [is] whether the case is of such a character that the last word, the ultimate guiding rule, should be announced by the Supreme Court, so that there may be uniformity of decision in the several circuits court of appeal . . . ." *See Wright v. North Carolina*, 415 U.S. 936 (1974) (Douglas, J., dissenting from the denial of cert.), *citing Hearings before Subcomm. of Sen. Comm. on Judiciary*, 68th Cong., 1st Sess., 29-30 (1924). What was true in the 1920s is

true at the dawn of the new Millennium – schisms on important questions of law demand the attention of this Court. *See Rotella v. Wood*, 528 U.S. 549, 553 (2000); *Gutierrez v. Ada*, 528 U.S. 250, 254 (2000).

What's more, the split in authority created by *Kelly (V)* threatens to affect capital habeas jurisprudence in perpetuity. Conflating the appointment of counsel with the existence of a pending case imperils the long-standing statutory bounds of federal habeas corpus. For over a century, this Court has recognized federal-state comity as the driving principle behind the exhaustion doctrine. *Ex parte Royall*, 117 U.S. 241, 251 (1886); *see also Rose v. Lundy*, 455 U.S. 509, 518 (1982) (noting "it would be unseemly" for federal courts to upset final state convictions absent a chance for the state's courts to correct the errors). A federal court cannot consider, much less grant, a state prisoner's habeas corpus petition unless the petitioner has first exhausted his state remedies as to every claim presented. 28 U.S. C. § 2254(b)(1); *Rose v. Lundy*, 455 U.S. at 522.

In *McFarland*, however, this Court extended the right to appointed federal habeas counsel to inmates who had not yet filed a petition. 512 U.S. 849, 856-59. In so doing, the Court relied on the non-specific "post conviction proceeding" language found in § 848(q)(4)(B), the statute authorizing appointments. *Id.* at 856. The Court also considered the desirability of affording attorneys to indigent inmates before they embarked, unassisted, in the highly technical and perilous world of capital habeas litigation. *Id.* at 856. Given the concerns that animate *McFarland*, as well as its open-ended holding, a district court arguably could appoint habeas counsel before a condemned inmate concluded his state court challenges to a judgment of death. *See generally In re Pruett*, 133 F.3d 275, 279 n.7 (4th Cir. 1997), *citing McFarland*, 512 U.S. at 855 ("Congress thus established a right to preapplication legal assistance for capital defendants in federal habeas corpus proceedings.") Were this to occur in the Ninth Circuit, however, the rule in *Kelly (V)* would create a pending case

where counsel had no legal ability to file a cognizable petition. *See Rose v. Lundy*, 455 U.S. at 522.

Similar, presumably unintended, consequences of *Kelly (V)* portend a nationwide schism in capital habeas jurisprudence. *Kelly (V)*, after all, holds that a habeas case exists as soon as a condemned inmate makes his § 848 request for appointed counsel. 163 F.3d at 539-40. This Court, in turn, has not defined when a case is "pending" under AEDPA but has interchangeably used the expressions "cases pending," "cases filed," and "applications pending." *Lindh v. Murphy*, 521 U.S. at 322-23, 326, 329, 336; *see Nobles v. Johnson*, 127 F.3d at 413 & n.7. Thus, by force of *Kelly (V)*'s non-intuitive definition of a case, an "application" can be pending though the state inmate had filed none, only requested the provision of an attorney to prepare one.

Having reached this point, *Kelly (V)* becomes the cudgel with which death row inmates could attempt to beat the life from AEDPA. Seemingly, the Ninth Circuit's condemned population could never run afoul of AEPDA's one-year period of limitations, as they could claim the existence of pending cases based on their mere requests for appointment of counsel to draft petitions. *Cf.* 28 U.S.C. § 2244 (d). Surely, Congress did not intend this result when it enacted legislation entitled the Antiterrorism and Effective Death Penalty Act of 1996. Quite the opposite, the law was designed to "curb the lengthy delays in filing that now often occur in federal habeas corpus litigation." H.R. Rep. No. 104-23, at 29 (1996).

Capital punishment occupies a unique and controversial place in the annals of modern America. *See* R. George Knight, *The Death Penalty and the Way We Think Now*, 33 LOY. L.A. L. REV. 533, 533-34 (2000). The citizenry's confidence in that system requires an even-handed application of post-conviction remedies. The litigants in capital cases should play by the same essential rules no matter where they happen to live. This Court has traditionally granted certiorari to review important questions of law in capital cases. *See Grisham v. Hagan*, 361 U.S. 278,

278-79 (1960); *Mallory v. United States*, 354 U.S. 449, 450 (1957). This case contemplates a fundamental question in capital habeas litigation and will ensure that the federal courts apply the same standard of review nationwide. The Court, therefore, should grant certiorari to review the doctrine articulated in *Kelly (V)* and applied here to avoid application of AEDPA.

II.

SANDOVAL WOULD NOT HAVE SECURED HABEAS RELIEF UNDER AEDPA

Absent the Ninth Circuit's reliance on pre-AEDPA law, it would not have vacated Sandoval's death sentence. Under AEDPA, this Court is the exclusive source of jurisprudence against which to measure the propriety of state court judgments. 28 U.S.C. § 2254(d); *Williams v. Taylor*, 120 S. Ct. 1495, 1506-07 (2000). "If this Court has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar." *Williams*, 120 S. Ct. at 1506-07. A state inmate can gain habeas relief only if he demonstrates that his state's courts "fail[ed] to apply the correct controlling authority" or applied the correct authority to a case involving materially identical facts but still "reach[ed] a different result." *Id.* at 1519-20.

In this case, the trial prosecutor paraphrased the thirteenth chapter of the Book of Romans, a portion of the New Testament, in his penalty phase argument to the jury. Appendices D, L. While offensive at many levels, the conduct did not run afoul of this Court's teachings. As a result, Sandoval could not have gained relief under AEDPA. *Williams*, 120 S. Ct. at 1506-07, 1519-20. The Ninth Circuit's opinion in this case, and the authority it cites, demonstrate the relative paucity of high court law on this issue. Quite simply, the *Sandoval* court could not marshal direct authority from this Court to support its finding that the prosecutor's misconduct amounted to constitutional error. Appendix L.

In support of its opinion, the Ninth Circuit cited one of its own cases and two Eleventh Circuit opinions regarding the general goal of argument – to direct the jury to a decision based on law and evidence rather than bias or prejudice. Appendix L

at 428-29, *citing Bains v. Cambra*, 204 F.3d 964, 974-75 (9th Cir. 2000); *Cunningham v. Zant*, 928 F.2d 1006, 1020 (11th Cir. 1991); *United States v. Iglesias*, 915 F.2d 1524, 1529 (11th Cir. 1990). It cited but one distantly related case from this Court on the same general point -- an opinion that upheld the right of the Florida state courts to broadcast proceedings, but cautioning vigilance in the protection of fair trial rights. Appendix L at 428.

The *Sandoval* court then turned to the doctrinal core of its opinion, citing interpretations of the Eighth Amendment that limit the scope of statutes used to render defendants eligible for the death penalty. Appendix L at 429, *citing Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). Of course, the constitutional bounds of sentencing schemes at the eligibility stage of capital proceedings in no way define what a prosecutor can argue to a jury charged with selecting the appropriate punishment. Under the Eighth Amendment, once the State has narrowed, by objective and reasonable criteria, the class of criminal homicides susceptible to capital punishment, the judge or jury that selects the appropriate penalty may exercise unfettered discretion, so long as the defendant's mitigating evidence receives a role in the determination. *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998); *Tuileapa v. California*, 512 U.S. 967 (1994).

Since Sandoval could not claim that the prosecutor's argument ran afoul of these requirements, the Ninth Circuit had no choice but to attempt to relate the Eighth Amendment more directly to argument. However, the only majority opinion cited in that regard originated in the Northern District of Georgia. Appendix L at 429-30, *citing Jones v. Kemp*, 706 F. Supp. 1534, 1559-60 (N.D. Ga. 1980). The Georgia case, and two dissenting Supreme Court opinions cited by the court on this point, discussed the impropriety of substituting the primitive simplicity of biblical vengeance for a sophisticated Eighth Amendment proportionality test. Appendix L 429-30, *citing Tison v. Arizona*, 481 U.S. 137, 180-81 (1987) (Brennan, J.,

dissenting) and *Coker v. Goergia*, 433 U.S. 584, 620 (1977) (Burger, C.J., dissenting).

Neither the dissents nor the district court opinion represent the clear authority of this Court. *See Williams. v. Taylor*, 120 S. Ct. at 1507. Furthermore, none of the three opinions bears any relation to the controverted prosecutorial comments at the bottom of this dispute. The prosecutor's argument did not involve the principle of an eye for an eye, but instead responded to a defense comment about "play[ing] God to an individual," and involved a discussion of the religious foundation for capital punishment as a whole. *See* Appendix L at 427-28 n.1. Given these facts, the California Supreme Court did not contradict or unreasonably apply any of the Eighth Amendment authority relied on by the Ninth Circuit. *Cf.* 28 U.S.C. § 2254(d).

For the same reason, the Ninth Circuit could not have granted relief under AEDPA had it relied, as it did here, on *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Appendix L at 430. In *Caldwell*, this court vacated a death sentence because the prosecutor affirmatively assured the jury that it would not be the final arbiter of the defendant's mortality -- a job he said would automatically fall to the appellate courts. 472 U.S. 330-34. This Court has recognized that a valid *Caldwell* claim requires affirmative misdirection of the penalty jury, as a matter of state law. *Jones v. United States*, 119 S. Ct. 2090, 2099 (1999); *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994); *Dugger v. Adams*, 489 U.S. 410 (1989). In this case, the trial prosecutor took the opposite tack, neither describing the State's capital sentencing procedures nor attempting to diminish the jury's responsibility. Instead he laid all responsibility for Sandoval's life squarely at the jurors' feet, simply assuring them that God ordained their authority. Appendix L at 427-28 n.1. Again, the authority cited by the Ninth Circuit did not compel relief under AEDPA.

Turning to generalized notions of fair trial and proper prosecutorial argument, the court in *Sandoval* found itself mining another bare vein of high court authority. The opinion

discusses no authority from this Court and relies on three circuit court opinions, three state court opinions, and a case from the Court of Appeal in Ontario, Canada. See Appendix L at 430-31, *citing Coe v. Bell*, 161 F.3d 320, 351 (6th Cir.1998); *Bennett v. Angelone*, 92 F.3d 1336, 1346 (4th Cir.1996); *Cunningham v. Zant*, 928 F.2d at 1019-20; *United States v. Giry*, 818 F.2d 120, 133 (1st Cir.1987); *Commonwealth v. Chambers*, 599 A.2d 630, 644 (Pa. 1990); *People v. Eckles*, 83 Ill. App.3d 292, 38 Ill. Dec. 934, 404 N.E.2d 358, 365 (1980); *State v. Wangberg*, 272 Minn. 204, 136 N.W.2d 853, 854-55 (1965); *R. v. Finta*, [1992] 53 O.A.C. 1, 1992 Carswell Ont. 96 at ¶ 250.

More than any other portion of the opinion, these passages demonstrate the absence of authority available from this Court on the issue of religiously freighted argument. This section also points up the wisdom of AEDPA, which relieves state courts of the burden of attempting to anticipate collateral attack on the basis of out-of-jurisdiction authority. When the California Supreme Court affirmed Sandoval's death sentence, surely no member of that tribunal could have foreseen a reversal based on the opinions of the Sixth, Fourth and First Circuit Courts of Appeals, much less the Pennsylvania and Minnesota Supreme Courts, the Illinois Appellate Court, or the Ontario Court of Appeal. When AEDPA became law before Sandoval filed his first habeas petition, these thoughts would have seemed all the more remote. *See Williams v. Taylor*, 120 S. Ct. 1479, 1490 (2000) (holding that Congress enacted AEDPA to advance comity, finality and federalism).

The analysis does not end here, however. Having found the trial prosecutor's argument offended the Constitution, the Ninth Circuit considered the question of prejudice. Even in this well explored area of the law, the *Sandoval* opinion lacks the clear guidance of this Court. Had this case turned on an overwhelming show of prejudice, the court could have relied on *Brecht v. Abrahamson*, which announces the presumptive harmless error test in habeas corpus matters. *See* 507 U.S. 619, 638 (1993). This record, though, does not lend itself to such

facile analysis, and the application of AEDPA would preclude a finding of prejudice here.

In articulating its prejudice finding, the Ninth Circuit carefully focused on the effect of the error with regard to "the Marlene Wells count." Appendix L at 435. Though the court concentrated on the one count for which Sandoval had received the death penalty, it had previously noted that "The State's case against Sandoval for the Belvedere Park crimes" and "for the Wells murders was . . . strong." Appendix L at 421.

Given the uniformly "strong" evidence of guilt, there remains only one rational means to distinguish among the four brutal slayings at issue in this case: "Marlene Wells was an innocent victim and the others were all of questionable character." Appendix L at 422. The district court found as much, and the Ninth Circuit panel never questioned the characterization. The appellate court's tacit acknowledgment of Marlene Wells' unique role in this case reflects the tragic nature of her death: Sandoval "had to do her, too," simply because she had the misfortune of witnessing him dispatch her husband with three shots to the head. Appendix L at 415. Because of the characteristically cold-blooded nature of Marlene's killing, the California Supreme Court's finding of harmless error relied explicitly upon the jury's split penalty verdict, which in turn condemned Sandoval only for Marlene's murder. Appendix D.

The undisputed facts, and relative horror, of the four murders at issue in this case also provide the foundation upon which the California Supreme Court's prejudice analysis would survive under AEDPA. Marlene Wells' status as an innocent victim is precisely the type of information the States may consider in administering their criminal justice systems. As this Court has held, the Constitution cannot bar States from "offering 'a quick glimpse of the life' which a defendant chose to extinguish." *Payne v. Tennessee*, 501 U.S. 808, 822 (1991). Given its significance during trial, consideration for the victim should also inform the analysis of federal habeas courts. Yet, in this instance, the Ninth Circuit's prejudice calculus fails to

factor in the life of Marlene Wells. Appendix L. The flawed equation yields, not surprisingly, a flawed result.

The court recognized that the trial evidence "show[ed] that Marlene Wells was more innocent than the other victims." Appendix L at 422. It also found that the trial prosecutor "remind[ed] the jury on various occasions that its duty was to determine whether the evidence in aggravation substantially outweighed the mitigating evidence." Appendix L at 437. The Warden relied on these facts in arguing that the objectionable aspects of the prosecutor's argument did not affect the verdict. Appendix O. Nonetheless, the court attempted to determine prejudice with a sterile approximation of the jury's reaction to a single segment of a lengthy prosecution argument. Removed from the facts that motivated the jury's perfectly rational penalty verdict, the court necessarily found itself adrift:

> We do not know what actually happened in the jury room, but we cannot assume that the prosecutor's religious argument did not persuade at least one of the jurors to change a vote for life to death on the Marlene Wells count.

Appendix L at 435.

As a result, the court could not, and did not, conclude that the error had substantial and injurious effect. *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). It, therefore, did not actually conclude the error prejudiced Sandoval. Instead, the court granted relief based on the standard this Court announced in *O'Neil v. McAninch*, 513 U.S. 432, 435 (1995): "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless." Appendix L at 437 , *citing Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc).

In the end, the court's decision to vacate the death verdict amounts to a simple disagreement with the California Supreme Court. This entire analysis would have failed under AEDPA, which demands much more than mere doubt; it requires a

showing that the state court contradicted or unreasonably applied clearly established federal law as articulated by this Court. 28 U.S.C. § 2254(d); *Williams. v. Taylor*, 120 S. Ct. at 1507. Here, the Ninth Circuit made no attempt to demonstrate that the California Supreme Court failed to properly apply this Court's harmless error standards, nor could it have succeeded in doing so given the facts of Marlene Wells' life and death. *See Chapman v. California*, 386 U.S. 18 (1968). Simply stated, the finding of prejudice defies serious analysis under Supreme Court jurisprudence. Accordingly, this Court should grant certiorari and reverse the judgment of the Ninth Circuit vacating Sandoval's sentence of death in the murder of Marlene Wells.

CONCLUSION

Based on the foregoing reasoning and authority, the Warden respectfully urges this Court to grant the Petition for Writ of Certiorari.

Dated: May 22, 2001

Respectfully submitted,

BILL LOCKYER
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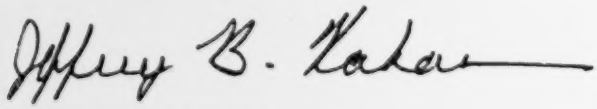

JEFFREY B. KAHAN
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

(2)
Supreme Court, U.S.
FILED
No. 001774 MAY 22 2001
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner,*

v.

ALFRED ARTHUR SANDOVAL, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

VOLUME I OF I

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451 P

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APPENDIX A

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

The People of the State of California PLAINTIFF(S)	CASE NUMBER A760386 DEPARTMENT NUMBER 116
SANDOVAL, ALFRED ARTHUR DEFENDANT(S)	VERDICT (Guilty)

We, the jury in the above-entitled action, find the Defendant ALFRED ARTHUR SANDOVAL guilty of the crime of MURDER, in violation of Section 187, Penal Code, a felony, as charged in Count 1 of the information and further find it to be MURDER of the first degree.

first/second

And further find the allegation that in the commission and attempted commission of the above offense the said defendant, ALFRED ARTHUR SANDOVAL, personally used a firearm, to wit, a handgun, within the meaning of PENAL CODE SECTION 12022.5 to be TRUE.

True/Not True

FILED
FEB 12 1987
FRANK S. ZOLIN,
COUNTY CLERK

/S/

BY S. LIEBLICH DEPUTY

This 11th day of February 1987. /S/

Foreman

76V210 (Rev. 11-81) 6-85

VERDICT (Guilty)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

The People of the State of California	CASE NUMBER A760386
	DEPARTMENT NUMBER 116
PLAINTIFF(S)	
vs.	
SANDOVAL, ALFRED ARTHUR	VERDICT (Guilty)
DEFENDANT(S)	

We, the jury in the above-entitled action, find the Defendant ALFRED ARTHUR SANDOVAL guilty of the crime of MURDER, in violation of Section 187, Penal Code, a felony, as charged in Count 2 of the information and further find it to be MURDER of the first degree.

first/second

And further find the allegation that in the commission and attempted commission of the above offense the said defendant, ALFRED ARTHUR SANDOVAL, personally used a firearm, to wit, a handgun, within the meaning of PENAL CODE SECTION 12022.5 to be TRUE.

True/Not True

FILED
FEB 12 1987
FRANK S. ZOLIN, COUNTY CLERK
/S/
BY S. LIEBLICH DEPUTY

This 11th day of February 1987. /S/
Foreman

VERDICT (Guilty)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

The People of the State of California	CASE NUMBER A760386 DEPARTMENT NUMBER 116
PLAINTIFF(S) vs.	
SANDOVAL, ALFRED ARTHUR	VERDICT (Guilty)
DEFENDANT(S)	

We, the jury in the above-entitled action, find the Defendant ALFRED ARTHUR SANDOVAL guilty of the crime of ATTEMPTED MURDER, in violation of Section 664/187, Penal Code, a felony, as charged in count 5 of the information.

And further find the allegation that in the commission and attempted commission of the above offense the said defendant, ALFRED ARTHUR SANDOVAL, personally used a firearm, to wit, a handgun, within the meaning of Penal Code Section 12022.5 to be True.

True/Not True

And further find the allegation that in the commission and attempted commission of the above offense the said defendant, ALFRED ARTHUR SANDOVAL, with the specific intent to inflict such injury, did personally inflict great bodily injury on Manuel Torres, within the meaning of

Penal Code Section 12022.7 to be TRUE.

FILED
FEB 12 1987
FRANK S. ZOLIN, COUNTY CLERK
/S/
BY S. LIEBLICH DEPUTY

This 11th day of FEBRUARY 1987. /S/
Foreman

VERDICT (Guilty)

76V210 (Rev. 11-81) 6-85

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

The People of the State of California	CASE NUMBER A760386 DEPARTMENT NUMBER 116
PLAINTIFF(S) vs.	
SANDOVAL, ALFRED ARTHUR	XXXXXXXXXXXXXX
DEFENDANT(S)	SPECIAL CIRCUMSTANCE FINDING

We, the Jury in the above-entitled action, find the XXXXX XXXX special circumstance alleged in the information, to wit, that the defendant, ALFRED ARTHUR SANDOVAL, was convicted in this trial of multiple murder within the meaning of Penal Code Section 190.2(a)(3) to be TRUE.

True/Not True

FILED
FEB. 12 1987
FRANK S. ZOLIN, COUNTY CLERK
/S/
BY S. LIEBLICH DEPUTY

This 12th day of February 1987. /S/

Foreman

SPECIAL CIRCUMSTANCE FINDING

76V210 (Rev. 11-81) 6-85

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DEPT. 116

Date: FEBRUARY 12, 1987 || S LIEBLICH
|| Deputy Clerk
HONORABLE: || G HALL Reporter
RICHARD P. KALUSTIAN JUDGE
J RAMSEY Deputy Sheriff

A760386 **(Parties and counsel checked if present)**
PEOPLE OF THE STATE OF CALIFORNIA Counsel for People:
VS. DEPUTY DISTRICT ATTY:
D. MILTON
01 SANDOVAL ALFRED ARTHUR Counsel for Defendant:
M KOPPLE/S APPLEBAUM
18704CTS 664/187 01CT

NATURE OF PROCEEDINGS JURY TRIAL REM 1-17-85

Trial resumes from February 11, 1987 with all jurors present as heretofore.

Jury deliberations resume at 7:50 a.m.

At 8:40 a.m. the jury returns into the courtroom in the presence of defense counsel Kopple (all other counsel and the defendant were not present) with a written request to view exhibits D, E, and F. The Court answered the request by stating that the requested exhibits were not admitted in evidence.

At 8:43 a.m. jury deliberations continue.

At 1:36 p.m. the jury returns into the courtroom in the presence of all counsel and the defendant with the following verdicts as to Counts 1, 2 and 5 and the special circumstance finding:

"TITLE OF COURT AND CAUSE: We, the Jury in the above-entitled action, find the Defendant ALFRED ARTHUR SANDOVAL guilty of the crime of MURDER, in violation of Section 187, Penal Code, a felony, as charged in Count 1 of the information and further find it to be MURDER of the first degree.

And further find the allegation that in the commission and attempted commission of the above offense the said defendant, ALFRED ARTHUR SANDOVAL, personally used a firearm, to wit, a handgun, within the meaning of PENAL CODE SECTION 12022.5 to be True.

This 11th day February, 1987, Juli B. Juras, Foreman

"TITLE OF COURT AND CAUSE: We, the jury in the above-entitled action, find the Defendant ALFRED ARTHUR SANDOVAL guilty of the crime of MURDER, in violation of Section 187, Penal Code, a felony, as charged in Count 2 of the information and further find it to be MURDER OF the first degree.

And further find the allegation that in the commission and attempted commission of the above offense the said Defendant,

MINUTES ENTERED
1-12-87
COUNTY CLERK

MINUTE ORDER

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DEPT. 116

Date: FEBRUARY 12, 1987 || S LIEBLICH
|| Deputy Clerk
HONORABLE: || G HALL Reporter
RICHARD P. KALUSTIAN
JUDGE
J RAMSEY Deputy Sheriff

A760386 **(Parties and counsel checked if present)**

PEOPLE OF THE STATE OF CALIFORNIA	Counsel for People: DEPUTY DISTRICT ATTY: D. MILTON
VS.	
01 SANDOVAL ALFRED ARTHUR	Counsel for Defendant: M KOPPLE/S APPLEBAUM
187 04CTS 664/187 01CT	

NATURE OF PROCEEDINGS JURY TRIAL CONTINUED REM 1-17-85 FROM PAGE 1

ALFRED ARTHUR SANDOVAL, personally used a firearm, to wit, a handgun, within the meaning of PENAL CODE SECTION 12022.5 to be true.

This 11th day of February, 1987, Juli Juras, Foreman

"TITLE OF COURT AND CAUSE: We, the Jury in the above-entitled action, find the Defendant ALFRED ARTHUR SANDOVAL guilty of the crime of ATTEMPTED MURDER, in violation of Section 664/187, Penal Code, a felony, as charged in count 5 of the information.

And further find the allegation that in the commission and attempted commission of the above offense the said defendant, ALFRED ARTHUR SANDOVAL, personally used a firearm, to wit, a handgun, within the meaning of Penal Code Section 12022.5 to be true.

And further find the allegation that in the commission and attempted commission of the above offense the said defendant ALFRED ARTHUR SANDOVAL, with the specific intent to inflict such injury, did personally inflict great bodily injury on Manuel Torres, within the meaning of Penal Code Section 12022.7 to be true.

This 11th day of February 1987, Juli B. Juras, Foreman.

"TITLE OF COURT AND CAUSE: We, the Jury in the above-entitled action, find the special circumstance alleged in the information, to wit, that the defendant, ALFRED ARTHUR SANDOVAL, was convicted in this trial of multiple murder within the meaning of Penal Code Section 190.2 (a) (3) to be true.

This 12th day of February, 1987, Juli Juras, Foreman"

The verdict is read; re-reading as recorded is waived. The jury is polled as to each verdict and the special circumstance finding, respectively. All twelve jurors answer in the affirmative as to each verdict and the special circumstance finding, respectively.

PAGE 2 OF 3 REM MINUTES ENTERED
2-12-87
COUNTY CLERK

MINUTE ORDER

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DEPT. 116

Date: FEBRUARY 12, 1987 || S LIEBLICH
|| Deputy Clerk
HONORABLE: || G HALL Reporter
RICHARD P. KALUSTIAN JUDGE
J RAMSEY Deputy Sheriff

A760386 **(Parties and counsel checked if present)**

PEOPLE OF THE STATE OF CALIFORNIA
VS.
01 SANDOVAL ALFRED ARTHUR
187 04CTS 664/187 01CT

Counsel for People:
DEPUTY DISTRICT ATTY:
D. MILTON
Counsel for Defendant:
M KOPPLE/S APPLEBAUM

NATURE OF PROCEEDINGS JURY TRIAL REM 1-17-85

All verdict forms submitted to the jury as to counts 1, 2 and 5 and the special circumstance finding are filed.

At 2:47 p.m. the jury is admonished and trial is continued for further deliberations on the remaining counts to February 17, 1987 at 7:45 a.m. in this department. The defendant is ordered to return.

PAGE 3 OF 3 REM

MINUTES ENTERED
2-17-87
COUNTY CLERK

MINUTE ORDER

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

FILED
FEB 23 1987
FRANK S. ZOLIN
COUNTY CLERK
BY: /S/
DEPUTY

The People of the State of California PLAINTIFF(S) vs. SANDOVAL, ALFRED ARTHUR DEFENDANT(S)	CASE NUMBER A760386 DEPARTMENT NUMBER 116 VERDICT (Guilty)

We, the jury in the above-entitled action, find the Defendant ALFRED ARTHUR SANDOVAL guilty of the crime of MURDER, in violation of Section 187, Penal Code, a felony, as charged in Count 3 of the information and further find it to be MURDER of the First degree.
first/second

And further find the allegation that in the commission and attempted commission of the above offense the said defendant, ALFRED ARTHUR SANDOVAL, personally used a firearm, to wit, a handgun, within the meaning of PENAL CODE SECTION 12022.5 to be TRUE.
True/Not True

This 23rd day of February 1987 /S/
VERDICT (Guilty) Foreman

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

FILED
FEB 23 1987
FRANK S. ZOLIN
COUNTY CLERK
BY: /S/
DEPUTY

The People of the State of California PLAINTIFF(S) vs. SANDOVAL, ALFRED ARTHUR DEFENDANT(S)	CASE NUMBER A760386 DEPARTMENT NUMBER 116 VERDICT (Guilty)

We, the jury in the above-entitled action, find the Defendant ALFRED ARTHUR SANDOVAL guilty of the crime of MURDER, in violation of Section 187, Penal Code, a felony, as charged in Count 4 of the information and further find it to be MURDER of the First degree.
first/second

And further find the allegation that in the commission and attempted commission of the above offense the said defendant, ALFRED ARTHUR SANDOVAL, personally used a firearm, to wit, a handgun, within the meaning of PENAL CODE SECTION 12022.5 to be TRUE.
True/Not True

This 23rd day of February 1987 /S/
VERDICT (Guilty) Foreman

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DEPT. 116

Date: FEBRUARY 12, 1987	S LEFF	Deputy Clerk
HONORABLE: RICHARD P. KALUSTIAN JUDGE	G HALL	Reporter
J RAMSEY Deputy Sheriff		

A760386 **(Parties and counsel checked if present)**

PEOPLE OF THE STATE OF CALIFORNIA VS.	Counsel for People: DEPUTY DISTRICT ATTY: D. MILTON
01 SANDOVAL ALFRED ARTHUR	Counsel for Defendant: M KOPPLE/S APPLEBAUM
18704CTS 664/187 01CT	

NATURE OF PROCEEDINGS JURY TRIAL REM 1-17-85

At 7:55 am, deliberations resume from 2/20/87 with all jurors present as heretofore.

The jury takes their morning break from 9:35 am to 10:00 am

From 11:30 am to 1:00 pm, the jury takes their lunch break.

At 1:13 pm, the jury returns into the court with the following verdicts:

"TITLE OF COURT AND CAUSE

We, the Jury in the above-entitled action, find the Defendant ALFRED ARTHUR SANDOVAL guilty of the crime of MURDER, in violation of Section 187 Penal Code, a felony, as charged in Count 3 of the information and further find it to be

MURDER of the first degree.

And further find the allegation that in the commission and attempted commission of the above offense the said defendant, ALFRED ARTHUR SANDOVAL, personally used a firearm, to wit, a handgun, within the meaning of PENAL CODE SECTION 12022.5 to be true.
This 23rd day of February 1987, Juli Juras, Foreman".

"TITLE OF COURT AND CAUSE
We, the Jury in the above-entitled action, find the Defendant ALFRED ARTHUR SANDOVAL guilty of the crime of MURDER, in violation of Section 187, Penal Code, a felony, as charged in Count 4 of the Information and further find it to be MURDER of the first degree.

And further find the allegation that in the commission and attempted commission of the above offense the said defendant, ALFRED ARTHUR SANDOVAL, personally used a firearm, to wit, a handgun, within the meaning of PENAL CODE SECTION 12022.5 to be true.
This 23rd day of February 1987, Juli Juras, Foreman."

The verdicts are read. The jury is polled as to each count and all jurors answer in the affirmative. The verdicts are recorded; re-reading as recorded is not waived. The clerk re-reads the verdicts as recorded. Instructions given and refused

MINUTES ENTERED
2/23/87
COUNTY CLERK

MINUTE ORDER

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DEPT. 116

Date: 2/23/87	||	S LEFF Deputy Clerk
	||	
HONORABLE:	||	G HALL Reporter
RICHARD P. KALUSTIAN	||	
JUDGE	||	
J RAMSEY Deputy Sheriff	||	

A760386 **(Parties and counsel checked if present)**

PEOPLE OF THE STATE OF CALIFORNIA	Counsel for People: DEPUTY DISTRICT ATTY:
VS.	
01 SANDOVAL ALFRED ARTHUR	Counsel for Defendant:
187 04cts 664/187 01CT	

NATURE OF PROCEEDINGS	CONTD FROM PAGE ONE	JURY TRIAL	REM	1/17/85

and all verdict forms as to Counts 3 and 4 are filed.

Penalty phase is set to commence 3/2/87, 9am, and the jury is directed to return as the above date and time.

Defendant's motion is set to be heard 2/24/87, 9am, this department.

REMANDED

MINUTES ENTERED
2/23/87
COUNTY CLERK

MINUTE ORDER

APPENDIX B

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

FILED
MAR 19 1987
FRANK S. ZOLIN
COUNTY CLERK
BY:M. LeJEAL DEPUTY

The People of the State of California PLAINTIFF(S) vs. SANDOVAL, ALFRED ARTHUR DEFENDANT(S)	CASE NUMBER A760386 DEPARTMENT NUMBER 116 VERDICT (Guilty) (LIFE WITHOUT THE POSSIBILITY OF PAROLE)

We, the jury in the above-entitled action, find in COUNT I of the information involving Gilbert Martinez that the appropriate punishment to be imposed on the Defendant, ALFRED ARTHUR SANDOVAL, is the sentence of confinement in the State Prison for life without the possibility of parole.

This 19th day of March 1987. /S/
Foreman

VERDICT

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

FILED
MAR 19 1987
FRANK S. ZOLIN
COUNTY CLERK
BY:M. LeJEAL
DEPUTY

The People of the State of California	CASE NUMBER A760386 DEPARTMENT NUMBER 116
PLAINTIFF(S) vs.	
SANDOVAL, ALFRED ARTHUR	VERDICT (LIFE WITHOUT THE POSSIBILITY OF PAROLE)
DEFENDANT(S)	

We, the jury in the above-entitled action, find in COUNT II of the information involving Anthony Aceves that the appropriate punishment to be imposed on the Defendant, ALFRED ARTHUR SANDOVAL, is the sentence of confinement in the State Prison for life without the possibility of parole.

This 19th day of March 1987, /S/
Foreman

VERDICT

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

FILED
MAR 19 1987
FRANK S. ZOLIN
COUNTY CLERK
BY:M. LeJEAL DEPUTY

The People of the State of California	CASE NUMBER A760386 DEPARTMENT NUMBER 116
PLAINTIFF(S) vs.	
SANDOVAL, ALFRED ARTHUR	VERDICT (LIFE WITHOUT THE POSSIBILITY OF PAROLE)
DEFENDANT(S)	

We, the jury in the above-entitled action, find in COUNT III of the information involving Raymond Wells that the appropriate punishment to be imposed on the Defendant, ALFRED ARTHUR SANDOVAL, is the sentence of confinement in the State Prison for life without the possibility of parole.

This 19th day of March 1987, /S/
Foreman

VERDICT

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

FILED
MAR 19 1987
FRANK S. ZOLIN
COUNTY CLERK
BY:M. LeJEAL DEPUTY

The People of the State of California	CASE NUMBER A760386
	DEPARTMENT NUMBER 116
PLAINTIFF(S) vs.	
SANDOVAL, ALFRED ARTHUR	VERDICT (DEATH)
DEFENDANT(S)	

We, the Jury in the above-entitled action, find in COUNT IV of the information involving Marlene Wells that the appropriate punishment to be imposed on the Defendant, ALFRED ARTHUR SANDOVAL, is the sentence of death.

This 19th day of March 1987, /S/
Foreman

VERDICT

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DEPT. 116

Date: March 19, 1987	M LE JEAL	Deputy Clerk
HONORABLE: RICHARD P. KALUSTIAN JUDGE	G HALL	Reporter
R ROBLEDO Deputy Sheriff		

A760386 **(Parties and counsel checked if present)**

PEOPLE OF THE STATE OF CALIFORNIA VS.	Counsel for People: DEPUTY DISTRICT ATTY: D. MILTON
01 SANDOVAL, ALFRED ARTHUR	Counsel for Defendant: M KOPPLE/S APPLEBAUM
187 04 cts; 664/187 01 ct	

NATURE OF PROCEEDINGS JURY TRIAL (PENALTY PHASE) REM 1-17-85

At 7:45 a.m. the jury resumes deliberations with all members present.

At 9:30 a.m. the jury announces through the Bailiff they have reached a verdict. Verdicts are sealed, counsel are notified and jury is excused pending the attorney's arrival.

At 12:00 all counsel, defendant and jurors are present. Sealed verdicts are opened by Court and the following verdicts are ready by the Clerk:

"TITLE OF COURT AND CAUSE

We, the Jury in the above-entitled action, find in Count I of the Information involving Gilbert Martinez that the appropriate

punishment to be imposed on the Defendant, ALFRED ARTHUR SANDOVAL, is the sentence of confinement in the State Prison for life without possibility of parole.

This 19th day of March, 1987, Julieanne B. Juris, Foreman."

"TITLE OF COURT AND CAUSE

We, the Jury in the above-entitled action, find in Count II of the Information involving Anthony Aceves that the appropriate punishment to be imposed on the Defendant, ALFRED ARTHUR SANDOVAL, is the sentence of confinement in the State Prison for life without the possibility of parole.

This 19th day of March, 1987, Julieanne B. Juris, Foreman."

"TITLE OF COURT AND CAUSE

We, the Jury in the above-entitled action, find in Count III of the Information involving Raymond Wells that the appropriate punishment to be imposed on the Defendant, ALFRED ARTHUR SANDOVAL, is the sentence of confinement in the State Prison for life without the possibility of parole.

This 19th day of March, 1987, Julieanne B. Juris, Foreman."

"TITLE OF COURT AND CAUSE

We, the Jury in the above-entitled action, find in Count IV of the Information involving Marlene Wells that the appropriate punishment to be imposed on the Defendant, ALFRED ARTHUR SANDOVAL, is the sentence of Death.

This 19th day of March , 1987, Julieanne B. Juris, Foreman."

PAGE ONE OF TWO PAGES

rem

MINUTES ENTERED
3-19-87
COUNTY CLERK

MINUTE ORDER

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DEPT. 116

Date: March 19, 1987	M. LE JEAL	Deputy Clerk
HONORABLE: RICHARD P. KALUSTIAN JUDGE	G HALL	Reporter
R ROBLEDO Deputy Sheriff		

A760386 **(Parties and counsel checked if present)**

PEOPLE OF THE STATE OF CALIFORNIA VS.	Counsel for People: DEPUTY DISTRICT ATTY: D. MILTON
01 SANDOVAL, ALFRED ARTHUR	Counsel for Defendant: M KOPPLE/S APPLEBAUM
187 04 cts; 664/187 01 ct	

NATURE OF PROCEEDINGS	JURY TRIAL	(PENALTY PHASE) REM 1-17-85

Polling of the jury is waived as to Counts I, II and III and the jury is polled as to Count IV, with all jurors answering in the affirmative. Reading of the verdicts as recorded is waived. All verdict forms, used and unused are filed. Instructions given and refused are filed. The jury is thanked and discharged.

Matter is continued for Sentencing hearing on May 15, 1987 in Department "P" Norwalk. Defendant is ordered to return.

PAGE TWO OF TWO PAGES

MINUTES ENTERED
rem 3-19-87
COUNTY CLERK

MINUTE ORDER

APPENDIX C

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DEPT.SE P

Date: June 30, 1987	J. DOMCIK	Deputy Clerk
HONORABLE: RICHARD P. KALUSTIAN JUDGE	G. HALL	Reporter
R. ALLEN Deputy Sheriff		

A760386 **(Parties and counsel checked if present)**

PEOPLE OF THE STATE OF CALIFORNIA VS.	Counsel for People: DEPUTY DISTRICT ATTY: D. MILTON
01 SANDOVAL ALFRED ARTHUR	Counsel for Defendant: M KOPPLE/
187.A 04 cts; 664/187 01 cts	S APPLEBAUM

NATURE OF PROCEEDINGS REM
JUDGMENT AND SENTENCING

Hearing on Defense motion for New Trial is called. The motion is argued and denied as further reflected in the official notes of the court reporter.

Hearing on Defense motion to modify Verdict of Death is called. The motion is argued and denied as further reflected in the official notes of the court reporter.

The Court orders that a new Probation Report be prepared deleting lines 10-12, 15-22 on page 16 of the present report dated 6-22-87.

The defendant having been found guilty of Section 187.A

Penal Code and one of the circumstances pursuant to Section 190.2(a)(3) Penal Code having been found true in the manner prescribed by law, the defendant is sentenced to DEATH, as to Count IV, MURDER IN THE FIRST DEGREE.

Counts I, II, III, each a violation of Penal Code Section 187.A, The defendant is sentenced to LIFE IN STATE PRISON without the possibility of parole.

Count V, a violation of Penal Code Section 664/187.A, The defendant is sentenced to the High term of 9 years in State Prison, plus 3 years in State Prison as to the Great Bodily Injury Allegations, for a total of 12 years State Prison.

The State Prison sentence in Counts I, II, III, and V is permanently stayed upon the execution of sentence imposed in Count IV.

The Sheriff is ordered to transport the defendant to State Prison, to be held pending the decision upon his appeal.

The Commitment Judgment of Death is read and executed by the Court in open court and attested to by the clerk under seal of the court. Defendant is advised of automatic appeal.

REMANDED

MINUTES ENTERED
SE P 06-30-87
COUNTY CLERK

MINUTE ORDER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

FILED
JUN 30 1987
FRANK S. ZOLIN,
COUNTY CLERK
By: /S/
DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA,	) NO. A760386) COMMITMENT) JUDGEMENT OF
Plaintiff,	) DEATH
v.	)
ALFRED ARTHUR SANDOVAL,	) DEPARTMENT) SOUTHEAST P
Defendant(s)	)

TO THE SHERIFF OF LOS ANGELES COUNTY AND TO THE WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA AT SAN QUENTIN:

BE IT REMEMBER that on the 22nd day of June, 1985, an Information number A760386 was duly filed against the defendant, ALFRED ARTHUR SANDOVAL, by the District Attorney of Los Angeles County, charging said defendant with the crimes of:

Count I: The murder of Gilbert Martinez on the 14th day of October, 1984 in violation of Penal Code Section 187.

Count II: The murder of Anthony Aceves on the 14th day of October, 1984 in violation of Penal Code Section 187.

Count III: The murder of Ray Wells on the 31st day of October, 1984 in violation of Penal Code Section 187.

Count IV: The murder of Marlene Wells on the 31st day

of October,1984 in violation of Penal Code Section 187.

Count V: The attempted murder of Manuel Torres on the 14th day of October, 1984 in violation of Penal Code Section 664/187.

It is further alleged that during the commission of Count V the defendant, ALFRED ARTHUR SANDOVAL, personally inflicted great bodily injury upon Manuel Torres within the meaning of Penal Code Section 12022.7.

It is further alleged that during the commission of the above offenses in Count I, II, III, IV and V, the defendant, ALFRED ARTHUR SANDOVAL, personally used a firearm to wit, a handgun, within the meaning of Penal Code Section 12022.5.

It is further charged and alleged that the above murders in Count I, II, III and IV were committed under the following special circumstances, to wit: the defendant, ALFRED ARTHUR SANDOVAL, has in this proceeding been convicted of more than one offense of murder in the first or second degree within the meaning of Penal Code Section 190.2 (a)(3).

It is further alleged that said defendant, ALFRED ARTHUR SANDOVAL, was on or about the 25th day of September, 1979, in the Superior Court of the State of California, for the County of Los Angeles, convicted of a violent felony, to wit, Assault With Intent to Murder, case A524411, the he then served a separate term in State Prison for said offense, and that he did not remain free of prison custody for and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term, within the meaning of Penal Code Section 667(a), 667.5(a) and 1203 (e)(5).

Thereafter, defendant was duly arraigned, entered a plea of not guilty to all charges, denied the prior conviction and the special circumstances as set forth in the Information.

Thereafter, on October 28, 1986, the defendant and his attorneys being present, the case came on for trial and the selection of the jury was commenced.

Thereafter, evidence was duly presented to the trial jury as to the issues raised by the defendant's plea of not guilty, and his denial of the special circumstances in the Information.

Thereafter, after the defense and prosecution concluded the presentation of evidence, argument was made to said trial jury by the prosecution and defense, and the court instructed said trial jury as to the law applicable to the case.

Thereafter, on February 12, 1987 the jury returned verdicts on Counts I, II and V as follows: Guilty on all counts; murders to be in the first degree; true on all enhancements and special circumstances found to be true.

Thereafter, on February 23, 1987 the jury returned verdicts on Counts III and IV as follows: Guilty on both counts; murders to be in the first degree; true on all enhancements.

Thereafter, the defendant, ALFRED ARTHUR SANDOVAL, admitted as true the prior felony conviction alleged pursuant to Penal Code Section 667(a), 667.5(a) and 1203(e)(5).

Thereafter, commencing on March 2, 1987 pursuant to Penal Code Section 190.3, evidence was presented on behalf of both the prosecution and the defense as to evidence in aggravation and mitigation in regard to the proper penalty. Thereafter, following arguments of all counsel and instructions of law by the court, the said jury, on March 19, 1987, did return a finding on each of the four murder counts as follows:

Count I: Confinement in the state prison for Life Without the Possibility of Parole.

Count II: Confinement in the state prison for Life Without the Possibility of Parole.

Count III: Confinement in the state prison for Life Without the Possibility of Parole.

Count IV: Death.

Thereafter, on June 30, 1987 the defendant's motion for a new trial and for modification of the verdict and finding imposing the death penalty were heard by the court and said motions were denied, whereupon on June 30, 1987 the

defendant's counsel stated there was no legal cause why sentence should not be pronounced and the court pronounced judgment as follows:

ALFRED ARTHUR SANDOVAL, it is the judgment and sentence of this court for the offense of murder of victim Marlene Wells as charged in Count IV of the information of which you previously, to wit, on February 23, 1987, were found guilty, the jury having found the offense of murder to be the first degree and the jury having returned a finding that the special circumstances alleged in the information under California Penal Code Section 190.2(a)(3) were true; and the jury having previously, to wit, on March 19, 1987 found that the penalty shall be death; and this court having, on June 30, 1987 denied your motion for a new trial and application for modification of verdict and finding imposing the death penalty; it is the order of this court that you shall suffer the death penalty, it is the order of this court that you shall suffer the death penalty, said penalty to be inflicted within the walls of the state prison at San Quentin, California, in the manner presented by law and at a time to be fixed by this court in the warrant of execution.

ALFRED ARTHUR SANDOVAL, it is the judgment and sentence of this court for the offenses of murder of victims Gilbert Martinez and Anthony Aceves as charged in Counts I and II, respectively, of the Information of which you previously, to wit, on February 12 1987, were found guilty, and for the offense of murder of victim Ray wells as charged in Count II of the Information of which you previously, to wit, on February 23, 1987, were found guilty, the jury having found the special circumstances to be true and this court having, on June 30, 1987, denied your motion for new trial and application for modification of verdict; it is the order of this court that you shall suffer confinement in the state prison for Life Without the Possibility of Parole; and for the attempted murder of Manuel Torres with personal use of a firearm and personal infliction of great bodily injury as charged in Count V of the Information of

which you previously have been convicted on February 12, 1987, it is the order of this Court that you shall suffer a term of 9 years in state prison.

Such sentences, imposed on Counts I, II, III and V, to be permanently stayed after execution of the sentence of death imposed on Count IV for the murder of Marlene Wells.

ALFRED ARTHUR SANDOVAL, you are remanded to the care, custody and control of the Sheriff of Los Angeles County to be by him delivered to the warden of the State Penitentiary at San Quentin, California, within 10 days from the date hereof, in the usual course of his duties for the execution of the sentence of the offenses of murder in the first degree contained in the Information of which you have been found guilty and the special circumstanced having been found to be true, to be held by him pending the final determination of your appeal in this matter, which is automatic, and said sentence to be executed upon final determination of said appeal, and you are to be held by him during said period of time, until further order of this court. It is so ordered.

Therefore, this is to command you, the Sheriff of said County of Los Angeles as provided in said judgment, to take ALFRED ARTHUR SANDOVAL to the State Prison of the State of California, and deliver him into the custody of the warden of the said state prison; and this

FURTHER, is to command you, the Warden of the State Prison of the State of California, at San Quentin, California, to hold in your custody, the said ALFRED ARTHUR SANDOVAL, pending the decision of this cause on appeal, and upon the judgment herein becoming final, to carry into effect the judgment of said court at a time and on a date to be hereafter fixed by order of this court, with the State Prison, at which time and place you shall then and there put to death the said ALFRED ARTHUR SANDOVAL in the manner and means prescribed by law.

In Witness Whereof, I have hereunto set my hand as Judge of the said Superior Court, and have caused the seal of the said

court to be affixed hereto.

Dated, this 30th day of June

(SEAL) SUPERIOR COURT
OF THE LOS ANGELES
COUNTY
CALIFORNIA

/S/
CLERK OF THE SUPERIOR COURT

Dated, this 30th day of June, 1987.

(SEAL)
SUPERIOR COURT OF
THE LOS ANGELES COUNTY
CALIFORNIA

RICHARD P. KALUSTIAN
JUDGE OF THE SUPERIOR COURT

APPENDIX D

THE PEOPLE, Plaintiff and Respondent,
v.
ALFRED ARTHUR SANDOVAL, Defendant and Appellant.

No. S004765. Crim. No. 26405.

Supreme Court of California

Dec 14, 1992.

SUMMARY

Defendant was convicted of four counts of first degree murder (Pen. Code, § 187), with a multiple-murder special-circumstance finding (Pen. Code, § 190.2, subd. (a)(3)), and one count of attempted murder (Pen. Code, §§ 187, 664). The jury also found that defendant had personally used a firearm in the commission of each offense (Pen. Code, § 12022.5). Defendant had fatally shot two men and had wounded another man during a gang-related confrontation in a park, and had fatally shot a man and a woman in their home approximately two weeks later. The jury returned a verdict of death for the murder of the woman, and verdicts of life imprisonment without possibility of parole for the murders of the three men. (Superior Court of Los Angeles County, No. A760386, Richard P. Kalustian, Judge.)

The Supreme Court affirmed the judgment. As to guilt phase issues, the court held that the trial court did not err in denying defendant's motion to sever, in admitting evidence of defendant's gang affiliation, or in excluding evidence of the alleged culpability of third parties. The court also held that defendant's prior conviction of assault with intent to commit murder was properly admitted for impeachment, and that the

trial court properly refused to rule, in advance of defendant's testimony, on his request to limit the scope of cross-examination. The court further held that the prosecutor did not commit misconduct in cross-examining a defense expert as to his bias and suggesting to the jury that the expert was a liar, but that the prosecutor did engage in nonprejudicial misconduct by denigrating defense counsel during closing argument.

As to the penalty phase, the court held that the prosecutor did not improperly cross-examine a defense witness concerning defendant's gang membership, and that the trial court did not err in refusing to give defendant's proposed instruction that age could be considered only as a mitigating factor. The prosecutor did not engage in misconduct, the court held, when he argued the effect of defendant's crimes on the victims and their families, but *156 did engage in nonprejudicial misconduct by paraphrasing a biblical passage in support of the death penalty. The court further held that the trial court did not abuse its discretion in refusing to declare a mistrial due to jury deadlock, or in requiring a separate penalty verdict as to each murder victim. (Opinion by Panelli, J., with Lucas, C. J., Kennard, Arabian, Baxter and George, JJ., concurring. Separate concurring and dissenting opinion by Mosk, J.)

HEADNOTES
Classified to California Digest of Official Reports

(1) Criminal Law § 202--Trial--Separate Trials on Different Counts-- Severance Motion--Factors.
When the requirements of Pen. Code, § 954 (joinder and severance of criminal charges), for joinder of different offenses are satisfied, a defendant can predicate error on the trial court's refusal to sever charges only by making a clear showing that there is a substantial danger of prejudice requiring that the charges be separately tried. The determination of prejudice is

necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a severance motion. Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.

(2) Criminal Law § 202--Trial--Separate Trials on Different Counts-- Multiple Murder Charges Arising From Different Incidents.

In a capital homicide prosecution involving four alleged murders committed on two different occasions, the trial court did not err in denying defendant's motion to sever (Pen. Code, § 954). The fact that the evidence concerning the two incidents may not have been cross-admissible was merely one factor suggesting possible prejudice, and, while defendant alleged that the evidence concerning one incident was far weaker than that concerning the other, the prosecutor had represented to the trial court that there would be testimony at trial linking the two incidents and adding significantly to the strength of the weaker case. The inflammatory effect of evidence of defendant's gang membership ***157** as to one incident was neutralized by the fact that the victims in that incident were also gang members. Moreover, the case was not one in which the capital charges resulted solely from the joinder of the two incidents. Finally, while defendant may have desired to testify only as to one incident, he did not explain the nature of his testimony or why he wanted to give testimony only in one case.

(3) Criminal Law § 649--Appellate Review--Harmless and Reversible Error-- Particular Errors--Trial--Denial of Severance Motion.

When a criminal defendant, on an appeal following trial, raises an issue as to the trial court's denial of a motion to sever multiple charges for trial (Pen. Code, § 954), the reviewing court must consider whether, despite the correctness of the trial court's ruling, a gross unfairness has occurred from the joinder, so as to deprive the defendant of a fair trial or due process of law.

(4) Homicide § 40--Evidence--Admissibility--Evidence of Gang Membership-- Relevance.

In a capital homicide prosecution, the trial court did not err in admitting evidence of defendant's gang affiliation, which established that defendant and the victims had been members of rival gangs. The fact that the gangs purportedly had been at peace for seven years did not eliminate gang retaliation as a motive for defendant's crimes. On the contrary, such retaliation appeared to have been the only plausible motive, in that the gang of which defendant had been a member had considered a certain park to be its territory, and defendant's victims, who had been members of a rival gang, had been shot in that park, without any other provocation.

[Admissibility of evidence of accused's membership in gang, note, 39 A.L.R.4th 775.]

(5a, 5b) Homicide § 40--Evidence--Admissibility--Third Party Culpability.

In a capital homicide prosecution, the trial court did not err in excluding, pursuant to Evid. Code, § 352 (trial court's discretion to exclude evidence), evidence of the alleged culpability of third parties, where, although the defense argued that one of the victims had been the center of a violent criminal operation and that any number of accomplices or rivals could have killed him,

there was no evidence of another person's actual motive to commit the crimes. The defense had merely raised the possibility that others had such a motive, and, while it did identify two persons with plausible motives, there was no evidence linking those persons to the actual perpetration of the crimes.

(6) Criminal Law § 292--Evidence--Admissibility--Claims and Defenses of Accused--Third Party Culpability.

A criminal defendant ***158** has a right to present evidence of the alleged culpability of a third party if it is capable of raising a reasonable doubt about the defendant's own guilt. That rule, however, does not require that any evidence, however remote, must be admitted to show a third party's possible culpability. Evidence of another person's mere motive or opportunity to commit the crime, without more, will not suffice to raise a reasonable doubt about the defendant's guilt. Rather, there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.

(7) Homicide § 58--Evidence--Admissibility--Documentary Evidence--Entire Writing to Explain Part.

In a capital homicide prosecution in which defendant alleged that one of the victims had been the center of a violent criminal operation and that any number of accomplices or rivals could have killed him, the trial court properly excluded evidence consisting of an appointment book and weekly planners found in the victim's home, even though the prosecution had been permitted to introduce two slips of paper, bearing defendant's nickname and another name, which had been found clipped to the appointment book. Evid. Code, § 356, does provide that where part of an act, declaration, conversation, or writing is given in evidence, then any other act, declaration, conversation, or writing that is necessary to make it understood may also be given in evidence. The book and the weekly planners, however, were not part of a writing given in evidence by the prosecution,

and were not necessary to an understanding of the slips of paper.

[See 1 Witkin, Cal. Evidence (3d ed. 1986) §§ 319-320.]

(8) Criminal Law § 308--Evidence--Admissibility--Evidence of Other Crimes or Misconduct--Exceptions to Rule of Inadmissibility--Impeachment--Prior Conviction Involving Moral Turpitude.

In a capital homicide prosecution, the trial court did not err in ruling that defendant's prior conviction of assault with intent to commit murder was admissible for impeachment purposes, where the trial court followed the analysis of a prior California Supreme Court decision interpreting Cal. Const., art. § 28, subd. (f), and properly concluded that defendant's prior conviction involved moral turpitude, and then exercised its discretion under Evid. Code, § 352, to conclude that the probative value of the evidence outweighed its prejudicial effect. The trial court did note that it could not assess the impact of the prior conviction on defendant's testimony because no offer of proof as to that testimony had been made. It did not, however, state that such an offer of proof was required. In fact, it noted that California law did not require such an offer of proof at the time. Moreover, due to the *159 similarity of the prior and one of the charged crimes, the court offered to sanitize the prior by allowing reference to it only as a prior felony conviction. It did not abuse its discretion in doing so.

(9) Criminal Law § 288--Evidence--Admissibility--Discretion of Trial Court--Proposition 8.

The intention of the drafters of Prop. 8 was to restore the trial court's discretion as visualized by the Evidence Code and to reject the rigid, black letter rules of exclusion that had been grafted onto the Evidence Code by previous decisions of the California Supreme Court.

(10) Criminal Law § 217--Trial--Course and Conduct of Trial--Cross- examination of Defendant--Trial Court's Refusal to Limit Scope.

In a capital homicide prosecution involving four murders allegedly committed in two separate incidents, in which defense counsel indicated that defendant desired to testify concerning self-defense as to one incident, but not to testify at all concerning the other incident, defendant's right to testify on his own behalf was not violated when the trial court refused to rule, in advance of defendant's actual testimony, on his request to limit the scope of cross-examination to the incident about which he planned to testify. While defense counsel argued that the two incidents were entirely separate and that direct and cross-examination could be so limited, counsel gave no further details as an offer of proof. Moreover, the prosecutor argued that there was an evidentiary spillover between the two incidents. Thus, the trial court acted well within its discretion in denying defendant's request.

(11) Criminal Law § 454--Argument and Conduct of Counsel--Prosecutor-- Closing Argument--Comment on Witnesses--Calling Defense Expert Liar.

In a capital homicide prosecution, the prosecutor did not engage in misconduct in cross-examining a defense forensic psychiatrist as to his interest in helping the defense, eliciting an admission that the expert had testified differently in other cases concerning the distinction between alcohol and PCP intoxication, and then arguing to the jury that the witness was a liar on the basis of that admission. The prosecutor was entitled to question the expert's testimonial consistency and possible bias, and referring to testimony as "lies" is an acceptable practice as long as the prosecutor argues inferences based on the evidence rather than personal belief. The prosecutor's argument met that requirement, and amounted to nothing more than vigorous, yet fair, argument. In any event, defendant waived any error as to the prosecutor's comment that the expert was a

liar, since he failed to object to it during trial. *160

(12) Criminal Law § 448--Argument and Conduct of Counsel--Prosecutor-- Examination of Witnesses--Cross-examination of Defense Alibi Witness--Concerning Defense Counsel's Assistance in Fabricating Testimony.

In a capital homicide prosecution involving two alleged sets of murders, the prosecutor did not improperly suggest that defense counsel had colluded with an alibi witness in fabricating his testimony, where the witness contended he and defendant had traveled together to a ranch in Mexico before the second set of murders and that defendant was there at all crucial times, and the prosecutor, noting that the witness's arrest near the border on the day he supposedly went to Mexico had not been revealed during direct examination, asked the witness if defense counsel had tried to avoid the subject. Similarly, it was not improper for the prosecutor to ask the witness if defense counsel had explained to him that it was necessary to state that defendant had been in Mexico on a certain day, and that the witness would be liable as an accessory after the fact if he admitted that he knew defendant had committed an earlier set of murders at the time they supposedly went to Mexico. In any event, defendant waived the point for purposes of appeal by failing to object at trial and request a timely admonition.

(13) Criminal Law § 559--Appellate Review--Presenting and Reserving Objections--Argument and Conduct of Prosecutor--Expressing Personal Disbelief in Testimony of Defense Alibi Witness.

In a capital homicide prosecution, defendant waived his contention on appeal that the prosecutor committed misconduct on cross-examination of a defense alibi witness by asking the witness when he was going to stop lying, thereby expressing the prosecutor's own personal disbelief in the witness's testimony, where defendant failed to object to the prosecutor's question,

and any harm could have been cured by a prompt admonition.

(14) Criminal Law § 448--Argument and Conduct of Counsel--Prosecutor-- Examination of Witnesses--Cross-examination of Defense Alibi Witness--Improper Impeachment With Prior Drug Arrest.
In a capital homicide prosecution, defendant was not prejudiced by the prosecutor's allegedly improper attempt to impeach an alibi witness with evidence of a drug arrest, where the prosecutor, in questioning the witness as to his arrest as an accessory to murder in the present case, queried, "You were also arrested for something else, weren't you?", and where defense counsel's objection to the question was sustained, although no admonition was requested or given. The jury was already aware that the witness had been arrested for possession of methamphetamines, and the jury was given the standard instruction stating that a *161 question is not evidence and that when an objection to a question was sustained, the jurors should not guess what the answer might have been (CALJIC No. 1.02).

(15) Criminal Law § 448--Argument and Conduct of Counsel--Prosecutor-- Examination of Witnesses--Cross-examination of Defense Alibi Witness--Questioning Witness on Failure to Offer Exculpatory Information. In a capital homicide prosecution, defendant could not have suffered any significant prejudice from alleged misconduct that occurred when the prosecutor cross-examined an alibi witness about his failure to volunteer his exculpatory information to the police prior to trial. Although defendant contended that the prosecutor knew that the witness had been arrested in the present case as an accessory to murder and had invoked his right to remain silent, the witness himself explained that that he had never told the police about the alibi because he had refused to be interviewed, and further stated on redirect examination that he had given the exculpatory information to the defense attorneys and their investigators a year before the

trial.

(16) Criminal Law § 448--Argument and Conduct of Counsel--Prosecutor-- Examination of Witnesses--Cross-examination of Defense Alibi Witness--Concerning Conversation Outside Courtroom.

In a capital homicide prosecution, there was no basis for branding, as being in bad faith, the prosecutor's questioning regarding a conversation between the prosecutor, defense counsel, and an alibi witness that occurred in an elevator after the witness had given his testimony on direct examination. The record showed only that on the morning after the conversation occurred, defense counsel reopened direct examination, questioning the witness about the conversation, and the witness testified that the prosecutor had threatened him by stating that "someone is going to jail behind this." The prosecutor then asked the witness whether the alleged threat had been in response to defense counsel's question, "Well, how do you guys like what happened in there today?" Defense counsel's objection to the question was overruled, and the witness stated that he only heard defense counsel say, "what's up?" None of the police officers who overheard the conversation were called as witnesses by either side.

(17a, 17b) Criminal Law § 451--Argument and Conduct of Counsel--Closing Argument--Denigration of Defense Counsel--Accusing Defense Counsel of Misleading Jurors and Perpetrating Fraud on Court.

In a capital homicide prosecution, although the prosecutor was entitled to argue the inconsistencies in the evidence and even to *162 characterize inconsistent testimony as "lies," it was improper to denigrate defense counsel rather than the evidence by referring to defense counsel's supposed attempts to mislead the jury and by accusing defense counsel of perpetrating a fraud on the court. Personal attacks on opposing counsel are improper and irrelevant to the issues. The prosecutor's references to

counsel's reaction to particular testimony was also improper, for the same reason. The remarks, however, were a small part of the prosecutor's very lengthy review of the evidence, and were clearly recognizable as an advocate's hyperbole. Thus, there was no reasonable probability that the jury would have reached a more favorable result absent the objectionable comments.

[See Cal.Jur.3d (Rev), Criminal Law, § 2954; 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 2914.]

(18) Criminal Law § 451--Argument and Conduct of Counsel--Closing Argument--Denigration of Defense Counsel--Expressing Personal Opinion on Defendant's Guilt.
A prosecutor may vigorously argue his or her case, marshalling the facts and arguing inferences to be drawn therefrom. The prosecutor may not, however, express a personal belief in the defendant's guilt, in part because of the danger that jurors may assume that there is other evidence in the prosecutor's command on which that conclusion is based. It is also improper for the prosecutor to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case. It is not necessary to find that such an implication impinges upon the defendant's constitutional right to counsel. Instead, it is sufficient to note that the defendant's conviction should rest on the evidence, not on the derelictions of his or her counsel. Casting uncalled-for aspersions on defense counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences to be drawn therefrom.

(19) Criminal Law § 559--Appellate Review--Presenting and Reserving Objections--Argument and Conduct of Prosecutor--Expressing Personal Opinion on Defense Case.
In a capital homicide prosecution, in which defendant claimed that the prosecutor engaged in three instances of misconduct in the form of improperly expressing a personal opinion regarding

the defense case, defendant waived, for purposes of appeal, his argument with respect to two of the instances, having failed to raise timely objections to the comments at trial. As to the third instance, the prosecutor's statement that he shook his head in disbelief every time he thought about one defense witness's testimony ***163** was made in the context of reviewing the discrepancies in defense testimony, and it was not likely that the jury would have understood it as being based on anything outside the record.

(20) Criminal Law § 455--Argument and Conduct of Counsel--Prosecutor-- Closing Argument--Comment on Defendant's Failure to Testify. In a capital homicide prosecution, the prosecutor did not engage in prejudicial misconduct during closing argument by referring to defendant's failure to testify at trial, where the prosecutor stated that he had forestalled defense testimony by preemptively proving that defendant had not needed glasses at the time of the killings, and that if that fact had not been proven, the jury would have heard defendant claim that he shot at the victims during a fight in the park because he was not wearing his glasses at the time and could not see well. The trial court sustained defense counsel's objection and admonished the jury to disregard the comments to the extent they reflected on defendant's failure to testify. While the trial court overruled defendant's later objection to similar comments by the prosecutor during rebuttal, the earlier admonition was sufficient to cover these comments, which were clearly harmless, having been a minor feature in the prosecutor's lengthy argument.

(21) Criminal Law § 451--Argument and Conduct of Counsel--Prosecutor-- Closing Argument--Referring to Defendant's Neat Appearance in Court as Ploy.
In a capital homicide prosecution, in which defendant had worn a suit and reading glasses and had been clean-shaven during trial, defendant waived his claim on appeal that the prosecutor

engaged in misconduct by referring to the defendant's courtroom appearance as a "ploy" and by asserting that defendant did not need to wear the glasses at all times during the trial. Defendant failed to object to the comments, and any error could have been cured by a timely admonition. In any event, the statements could not have had a prejudicial effect in light of the overwhelming evidence of the killings.

(22) Criminal Law § 520--Judgment, Sentence, and Punishment--Penalty Trial--Prosecutorial Misconduct--Cross-examination of Defense Expert Concerning Defendant's Gang Membership. In the penalty phase of a capital homicide prosecution, the prosecutor did not engage in any misconduct in cross-examining a gang consultant who had been called by defendant to rebut evidence of defendant's *164 gang affiliation that had been properly admitted in the guilt phase. The witness had testified that the gang to which defendant had belonged had been reformulated into a neighborhood association with the goal of keeping the peace, that defendant had not been involved in gang activities after his release from prison in 1984, the year that the murders later occurred, and that he was working to keep other young people out of gangs. The prosecutor was entitled to attempt to negate that evidence by asking the witness if it was true that the gang to which defendant belonged was one of the most violent gangs in its area and was responsible for most of the murders in that area in a 10-year period, including 1984, and whether defendant had been one of the gang's most active members.

(23) Criminal Law § 448--Argument and Conduct of Counsel--Prosecutor-- Examination of Witnesses--Defense Reputation Witness--Cross-examination Concerning Defendant's Bad Acts--Good Faith Requirement.
The prosecution may inquire of a defense reputation witness whether the witness has heard of an act or conduct by the defendant that is inconsistent with the witness's testimony, as

long as the People have a good faith belief that the act or conduct about which they wish to inquire actually took place.

(24) Criminal Law § 523--Judgment, Sentence, and Punishment--Penalty Trial--Instructions--Age as Aggravating or Mitigating Factor. In the penalty phase of a capital homicide prosecution, the trial court did not err in refusing to give defendant's proposed special instruction that his age at the time of the crimes could be considered only as a mitigating factor, and instead giving CALJIC No. 8.84.1, which simply states that the jury may consider the age of the defendant at the time of the crime in determining the appropriate penalty. Mere chronological age should not, in and of itself, be deemed either aggravating or mitigating. The word "age" in the statutory sentencing factor is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Thus, either counsel may argue any such age-related inference in every case. Similarly, it was not improper for the prosecutor to argue that it was an aggravating factor that defendant, who was 26 years old at the time of the crimes, was old enough to know the difference between right and wrong.

(25) Criminal Law § 522--Judgment, Sentence, and Punishment--Penalty Trial--Argument--Impact of Crime on Victim's Family.

The injury inflicted by a capital homicide defendant, including evidence ***165** about the victim and the impact of the crime on the victim's family, is one of the circumstances of the crime, evidence of which is admissible under Pen. Code, § 190.3, factor (a). Thus, in the penalty phase of a capital homicide prosecution, in which defendant had introduced a photograph showing him as a young boy at his father's funeral in order to illustrate his difficult childhood, the prosecutor did not engage in misconduct by telling the jurors that when they looked at the photograph, they should think of the funerals of defendant's

victims, and that they should think of the victims' parents and families.

(26a, 26b) Criminal Law § 522--Judgment, Sentence, and Punishment-- Penalty Trial--Argument--Invoking Biblical Passage as Support for Death Penalty.

In the penalty phase of a capital homicide prosecution, the prosecutor engaged in misconduct during rebuttal argument by paraphrasing a Biblical passage commonly understood as providing justification for the death penalty, where the prosecutor's comments were not fairly responsive to defense counsel's closing argument. While a prosecutor may refer to matters that are not in evidence if they are common knowledge or are illustrations drawn from common experience, history, or literature, he or she may not invoke higher or other law as a consideration in the jury's sentencing determination. Nevertheless, the prosecutor's misconduct was not prejudicial, since the jurors deliberated for four days before indicating they were split on all four murder counts, then deliberated another day before returning verdicts of life without possibility of parole on three counts and a death penalty verdict on only one count. Under such circumstances, there was no reasonable possibility that the jury would have reached more favorable verdicts had the misconduct not occurred.

(27) Criminal Law § 522--Judgment, Sentence, and Punishment--Penalty Trial--Argument--Invoking Biblical Passage as Support for Death Penalty--Extent of Permissible Argument. Penalty determinations are to be based on the evidence presented by the parties and the legal instructions given by the court. Reference by either party to religious doctrine, commandments, or biblical passages tending to undermine that principle is improper. While the defense in a capital penalty trial must be allowed some latitude in its presentation of mitigating evidence, that latitude does not include exhortation of religious canons as a factor weighing

against the death penalty. Were the defense to present such an argument, it would be subject to objection by the prosecution and possible like-kind argument in rebuttal. What is objectionable is reliance on religious authority as supporting or opposing the death penalty. All reference to religion or religious figures is *166 not ruled out as long as the reference does not purport to be a religious law or commandment.

(28) Criminal Law § 261--Trial--Verdict--Rendition--Jury Deadlock--Trial Court's Discretion to Require Further Deliberation.

The determination of whether there is a reasonable probability that a jury can reach an agreement on a verdict, so as to warrant further deliberation, rests in the discretion of the trial court. The court must exercise its power, however, without coercing the jury, so as to avoid displacing the jury's independent judgment in favor of considerations of compromise and expediency. The question of coercion necessarily depends on the facts and circumstances of each case.

(29) Homicide § 98--Verdict, Sentence, and Punishment--Verdict--Jury Deadlock--Trial Court's Discretion to Require Further Deliberation.

In the penalty phase of a capital homicide prosecution, the trial court did not abuse its discretion in refusing to declare a mistrial under Pen. Code, § 1140 (no reasonable probability of agreement on verdict), even though the jury had deliberated fourteen and one-half hours, over a six-day period, before indicating that it was split on each of the four murder counts, and a poll of the jury revealed that no juror felt it was reasonably possible that an agreement could be reached. Given that the trial had lasted five months, it was not unreasonable to request that the jury spend a little more time deliberating. Moreover, the fact the order to continue deliberating was unaccompanied by further instructions, and the following day the jury reached verdicts of life imprisonment without

possibility of parole on three counts and a death sentence on the fourth count did not suggest that the trial court coerced the jury or that the verdicts resulted from compromise and expediency. The jury may have felt that only one death verdict was necessary, and that the one murder on which it did return a death verdict was the most egregious, since the victim had no involvement with defendant.

(30) Homicide § 98--Verdict, Sentence, and Punishment--Verdict--Multiple Murders--Requiring Separate Verdict as to Each Murder Victim.

In the penalty phase of a capital homicide prosecution, the trial court did not err in requiring the jury to return a separate penalty verdict as to each murder victim. A defendant who kills more than one person may be convicted and punished for each murder. The multiple verdicts did not obscure the overriding constitutional value of reaching a comprehensive determination of the appropriateness of the death penalty considering all aggravating and mitigating evidence, nor did they invite compromise verdicts, or place undue emphasis on the characteristics and status of each individual victim. ***167**

(31) Criminal Law § 523--Judgment, Sentence, and Punishment--Penalty Trial--Instructions--Imposition of Death Penalty Where Aggravating Factors Outweigh Mitigating Factors.

In the penalty phase of a capital homicide prosecution, the trial court did not err in giving CALJIC No. 8.84.2, which states that in order to impose the death penalty the jury must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors that they warrant death instead of life in prison without possibility of parole. While that instruction did not specifically state that the jury was required to find that the aggravating factors outweighed the mitigating factors, the court gave a further instruction that the weighing of the aggravating and mitigating factors was not a mere mechanical

counting of factors, that the jury was free to assign whatever moral or sympathetic value it deemed appropriate to each factor, and that it was to consider the totality of aggravating factors with the totality of the mitigating factors. These instructions, taken together, were sufficient to inform the jury that it could return a death verdict only if the aggravating circumstances outweighed the mitigating circumstances.

COUNSEL

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PANELLI, J.

Defendant was convicted by a jury in the Los Angeles County Superior Court of four counts of first degree murder (Pen. Code, *168 § 187) [FN1] with a multiple-murder special-circumstance finding (§ 190.2, subd. (a)(3)), and one count of attempted murder (§§ 664/187). The jury also found that defendant personally used a firearm in the commission of each offense (§ 12022.5).

FN1 All statutory references hereafter are to the Penal Code unless otherwise indicated.

The jury returned a verdict of death as to the conviction of murder of Marlene Wells and verdicts of life without possibility of parole as to the convictions of murder of Gilbert Martinez, Anthony Aceves, and Ray Wells. The appeal is automatic. (§ 1239, subd. (b).)

Guilt Phase Facts
Prosecution Case.
1. Belvedere Park Murders.

About 2:30 a.m. on October 14, 1984, Adela Rodriguez and a group of girls (Zebba, Susie, Dianne, Corine, and Yvonne), along with Gilbert Martinez and Manuel Torres, drove to Belvedere Park in East Los Angeles. Anthony Aceves and a man named Jack drove to the park in another car. Once there, the group broke up into couples. Adela walked off with Gilbert Martinez.

Adela and Gilbert started walking back to the car after Zebba called for them to return. A fight was about to start near the car between people Adela did not know. As Adela was getting in the car, Gilbert said, "Let me get my friends first." As Gilbert approached his friends, Adela saw defendant shoot Gilbert in the head at close range. Defendant also shot Anthony in the head, and he shot at Manuel as the latter ran away. Defendant turned and pointed the gun at Adela and her friend Susie. Susie backed the car out, and drove off. Defendant's car followed them for a short distance. The girls then returned to the park to check on their friends. Gilbert died in Adela's arms.

Susie Martinez testified that she drove Adela and the others to Belvedere Park on October 14, 1984. She walked around the park with Anthony Aceves until they were called back to the car. When they arrived at the car, she saw Carlos Tostado fighting with someone. The fight stopped, and she noticed defendant standing next to a brown Monte Carlo arguing or

talking with Anthony. Gilbert was nearby. Defendant pulled out a gun and shot Gilbert and Anthony in the head. After Gilbert fell to the ground, defendant shot him again. Susie did not see Gilbert or Anthony with any weapons, nor did she them make any aggressive gestures. ***169**

Carlos Tostado testified that he drove a white Monte Carlo to Belvedere Park on October 14, 1984. Several friends were with him. Another car drove up with four young women and three men. Tostado fought with one of the men. As the fight was breaking up, defendant, also known as "Chato," and Eugene Valenzuela, also known as "Pelon," drove up in a tan Monte Carlo. Defendant got out of the car, grabbed one of the men by the neck and shot him. Tostado had known defendant for about 10 years and was a member of the same gang, Arizona Marivilla. The victims belonged to a different gang, Mariana Marivilla.

Tostado admitted that he had lied to the police when he gave them statements on October 14, October 16, and December 12, 1984. He acknowledged that he was on probation for using phencyclidine (PCP) at the time of his testimony.

The prosecution read the preliminary hearing testimony of Manuel Torres, who had since died in an unrelated auto accident. He had gone to Belvedere Park in Susie's car with Gilbert Martinez and several young women. As they were getting into the car to leave, Gilbert stopped to talk to a group of people. Anthony Aceves left the car to "back up" Gilbert. Torres heard shots and saw Anthony fall to the ground. He himself was shot in the neck, but he did not see who shot him.

Deputy Sheriff Woodrow West went to Belvedere Park around 4 a.m. to investigate the shootings. He found a small pocket knife on the ground near the spot where Anthony Aceves had fallen. There were traces of blood on the knife. Deputy West

also found five expended .22-caliber bullet casings.

Autopsies performed on the bodies of Gilbert Martinez and Anthony Aceves revealed that both alcohol (.09 percent) and PCP (.033 micrograms per milliliter) were found in Martinez's blood and that PCP (.042 micrograms per milliliter) was detected in Aceves's liver tissue. Since Aceves died three days after the shooting, the PCP levels in his liver and blood would have been higher at the time of the shooting.

2. Wells Murders.

Benjamin Verduzco had known defendant for about 16 years and had been a fellow member of Arizona Marivilla, but Verduzco no longer belonged. He agreed to testify in exchange for release from prison. He was placed in a protection program, given $600 a month for room and board, and was promised a name change.

On October 15 or 16, 1984, defendant asked Verduzco to keep a beige and brown Monte Carlo in his garage because he was in some kind of trouble. *170 Verduzco agreed. Defendant left the car in Verduzco's garage and drove off with Eugene Valenzuela in a 1969 black Chevrolet Impala.

A week later, on October 24, 1984, defendant came to Verduzco's home. Ray and Marlene Wells arrived a few minutes later. Defendant asked to borrow $5 from Ray Wells and then left. That night, the police came to Verduzco's house and seized defendant's car.

On October 31, 1984, at 12:42 a.m., Frank Bender heard gunshots. He went to the front door of his house and looked across the street to the residence of Ray and Marlene Wells. He noticed that the Wellses' dog appeared frightened. He also saw a black 1968 Chevrolet Caprice parked nearby with the engine

running. [FN2] Shortly thereafter, he saw a silhouette cross the Wells yard and drive away in the car.

> FN2 Bender, who is a car buff, first told police it was a Chevrolet Impala. He determined it was a Chevrolet Caprice after examining a book of cars. The only difference between an Impala and a Caprice was that the Caprice had chrome strips. He remembered the car because it was in excellent shape.

That same night, between 1 and 2 a.m., defendant called Benjamin Verduzco and said, "Bennie, I just did the big mouth in." When Verduzco asked, "Who," defendant said, "Remember the one who was there in the morning with the car." He referred to him as "R" and did not use a name. Defendant also said, "You know I take care of business. I had to do her, too." Defendant killed "her" because she saw him "do R." Defendant said, "They have gone to heaven with the angels." Defendant said he did it so that "they wouldn't be snitching no more."

Deputy Sheriff Robert Havercroft went to the Wells residence on the night of the murders. The rear door of the house was closed but not locked. He found Ray Wells's body on a couch in the living room and Marlene's body in the doorway between the dining room and kitchen. Deputy Havercroft found no evidence of theft, and no signs of forced entry.

Deputy Havercroft found three appointment books with many names and addresses. Attached to one of the appointment books were two small pieces of paper. The names "Chato" and "Pelon" were written on one piece of paper, and the name "Moses Verduzco" was written on the other.

Betty Phipps sold a 1968 Chevrolet Caprice to defendant in October 1984. The car was not in running condition; defendant told her he was going to fix it up. On October 7, 1984, a black

1968 Chevrolet Caprice was stolen from the Los Angeles zoo. The stolen 1968 Chevrolet Caprice was stopped at the *171 United States-Mexico border at Tecate on December 15, 1984, while Salvador Rubio, a member of the Arizona Marivilla gang, was driving it. The license plate and vehicle identification numbers that were on the car did not belong to the car. One of the documents found in the glove compartment was a "pink slip" or ownership certificate with the name of Betty Phipps on the back.

Defense Case.

1. Belvedere Park Murders.

The defense presented evidence from law enforcement officers and others regarding inconsistent statements given by Adela Rodriguez and the other young women on the night of the shootings. Zebba Rodriguez testified that when she was walking back to the car she saw Gilbert Martinez, Anthony Aceves, and Manuel Torres arguing with about three other men. She was afraid, got in the car, heard shots, and ducked until she heard no more shots. When she raised her head, she saw Gilbert and Anthony lying on the ground. She did not see who had done the shooting.

David Martinez testified that he went to Belvedere Park on the night of the shooting with Carlos Tostado. He and Tostado had spent the day cruising, drinking beer and smoking PCP.

Dr. Griffith Thomas, a pathologist, testified that PCP can cause very bizarre and aggressive behavior. The amount of PCP in the victims' bodies would correlate with bizarre behavior. Dr. Donald Trockman, a forensic psychiatrist, testified that persons with amounts of PCP in their systems such as the victims showed were "unpredictable people" and that they "may attack you and try to kill you."

2. Wells Murders.

Detective Gene Hetzel interviewed Benjamin Verduzco on November 1, 1984. When he told Verduzco that the Wellses had been murdered, Verduzco appeared surprised and shocked. Verduzco did not mention that he had received a phone call from defendant on the night of the murders. He did not tell police about the phone call until much later.

Ralph Ortega testified that he went to a ranch in Tecate, Mexico with defendant and several other people on October 24, 1984. Ortega went back to Los Angeles and returned to Tecate with his wife and children on October 30, 1984. Defendant was still there. The next evening, October 31, Halloween, defendant and some others took Ortega's son trick-or-treating. ***172**

Guilt Phase Contentions

1. Denial of Motion to Sever Counts.

Defendant contends that the trial court erred in denying his motion to sever the Belvedere Park murders from the Wells murders. He argued for severance on the basis that the incidents were unrelated, not cross-admissible, and that the evidence in the Wells charges was far weaker than that in the Belvedere Park charges. The court denied severance based on the prosecutor's representation that Benjamin Verduzco would testify at trial and provide evidence of defendant's motive and premeditation concerning the Wells murders that linked them with the Belvedere Park murders.

Defendant renewed his motion to sever shortly before trial was scheduled to begin. The trial court denied the motion, again in reliance on the prosecutor's representation about Verduzco's anticipated testimony.

Section 954 provides in pertinent part: "An accusatory pleading

may charge two or more different offenses ... of the same class of crimes or offenses, under separate counts, ... provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. ..."

The statutory requirements for joinder were met here because both incidents involved the same class of crimes-murder. (1) Since the requirements for joinder were satisfied, defendant can predicate error only on a clear showing of potential prejudice. (People v. Johnson (1988) 47 Cal.3d 576, 587 [253 Cal.Rptr. 710, 764 P.2d 1087].) "The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (People v. Bean (1988) 46 Cal.3d 919, 938 [251 Cal.Rptr. 467, 760 P.2d 996].)

"The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial." (Frank v. Superior Court (1989) 48 Cal.3d 632, 639 [257 Cal.Rptr. 550, 770 P.2d 1119].) Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate *173 evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. (Ibid.; see also Williams v. Superior Court (1984) 36 Cal.3d 441, 453 [204 Cal.Rptr. 700, 683 P.2d 699].)

(2) Defendant bases his argument for prejudice primarily on the absence of cross-admissibility of the two sets of offenses. He argues that the trial court's reasoning did not establish that the evidence of the two separate incidents would have been admissible in its entirety had there been separate trials. According to defendant, all it established was that there would have been some minor evidentiary crossover as to the two incidents. However, even if defendant is correct on this point, it is now clear that cross-admissibility is not the sine qua non of joint trials. (People v. Mason (1991) 52 Cal.3d 909, 934 [277 Cal.Rptr. 166, 802 P.2d 950]; Frank v. Superior Court, supra, 48 Cal.3d at p. 641; People v. Poggi (1988) 45 Cal.3d 306, 321 [246 Cal.Rptr. 886, 753 P.2d 1082].) "While we have held that cross-admissibility ordinarily dispels any inference of prejudice, we have never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice." (People v. Mason, supra, 52 Cal.3d at p. 934.) "That the evidence would otherwise be inadmissible may be considered as a factor suggesting possible prejudice, but countervailing considerations that are not present when evidence of uncharged offenses is offered must be weighed in ruling on a severance motion. The burden is on the defendant therefore to persuade the court that these countervailing considerations are outweighed by a substantial danger of undue prejudice." (People v. Bean, supra, 46 Cal.3d at p. 939.)

Defendant did not carry that burden. The potential prejudice he asserted did not rise to the level of demonstrating that the court's denial of severance was an abuse of discretion. The court recognized that the anticipated testimony by Verduzco added significantly to the strength of the Wells case, thereby obviating the danger of a "spillover" effect from the Belvedere Park evidence. Indeed, the court suggested that it would reconsider the severance motion if the prosecution were not able to secure Verduzco's testimony. The inflammatory effect of defendant's gang membership as to the Belvedere Park case was neutralized

by the fact that the victims were also gang members. Moreover, this was not a case in which capital charges resulted solely from the joinder of the two incidents. (Cf. Williams v. Superior Court, supra, 36 Cal.3d at p. 454.)

Defendant also made passing reference to the fact that he had separate defenses that would be prejudiced because he desired to testify as to one *174 incident but not the other. Although we have not addressed this theory of prejudice, it has been considered by federal courts. The federal courts have ruled that severance is not mandatory every time a defendant wishes to testify to one charge but not to another. " 'If that were the law, a court would be divested of all control over the matter of severance and the choice would be entrusted to the defendant.' " (U.S. v. Archer (7th Cir. 1988) 843 F.2d 1019, 1022.) The need for severance does not arise in federal courts " 'until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other.' " (Ibid.; quoting Baker v. United States (D.C. Cir. (1968) 401 F.2d 958, 977 [131 App.D.C. 7]; see also United States v. Valentine (10th Cir. 1983) 706 F.2d 282, 291.) Federal courts have required the defendant to present enough information to satisfy the court that the claim of prejudice is genuine and to enable it to weigh the considerations of economy and expedient judicial administration against the defendant's interest in having a free choice with respect to testifying. (United States v. Valentine, supra, 706 F.2d at p. 291.)

Defendant's showing fell far short of anything that would have satisfied the federal standards or any standard this court might adopt. Defendant neither explained the nature of the testimony he wished to give in the Belvedere Park case nor his reasons for not wanting to testify in the Wells case. The trial court did not abuse its discretion in denying severance.

(3) Because the issue is raised on appeal following trial, we must also consider whether, "despite the correctness of the trial court's ruling, a gross unfairness has occurred from the joinder such as to deprive the defendant of a fair trial or due process of law." (People v. Johnson, supra, 47 Cal.3d at p. 590.) Defendant claims gross unfairness occurred as a result of the destruction of his ability to testify as to one incident but not as to the other. He has done no more, however, than make a bald assertion to that effect. "One asserting prejudice has the burden of proving it; a bald assertion of prejudice is not sufficient." (Id. at p. 591.) We conclude, therefore, that defendant has failed to show that denial of severance deprived him of a fair trial.

2. Use of Peremptory Challenges.

Defendant contends that the trial court erred in permitting the prosecutor to systematically exercise his peremptory challenges to excuse from the jury those prospective jurors who had expressed some scruples about imposition of the death penalty. Defendant acknowledges that we have addressed this contention on numerous occasions and have found no constitutional infirmity in permitting peremptory challenges by both sides on the basis of *175 specific juror attitudes on the death penalty. (See, e.g., People v. Caro (1988) 46 Cal.3d 1035, 1061 [251 Cal.Rptr. 757, 761 P.2d 680]; People v. Belmontes (1988) 45 Cal.3d 744, 799 [248 Cal.Rptr. 126, 755 P.2d 310].) Accordingly, we reject defendant's contention.

3. Evidence of Defendant's Gang Membership.

Defendant contends that the trial court erred in admitting evidence of his gang membership because it was irrelevant and prejudicial to his defense. Defendant objected pretrial by moving to preclude the prosecutor from referring to his alleged gang membership during opening statements. The prosecutor argued that evidence of gang membership was relevant to prove

the motive for the murders at Belvedere Park. The trial court ruled that the prosecutor had made a showing that the evidence was admissible and denied the motion.

Defendant later moved to strike the testimony of Carlos Tostado and Benjamin Verduzco on the ground that the prosecutor had used them to put irrelevant and prejudicial testimony before the jury of defendant's alleged gang membership. The trial court denied the motion, ruling that the gang membership evidence had not caused undue prejudice.

(4) Defendant argues that the evidence of gang membership was irrelevant and that the prosecutor never proved a gang-related motive for the shootings. We do not agree. The evidence established that the victims were members of a rival gang. The fact that the gangs purportedly had been at peace for seven years does not eliminate gang retaliation as a motive. Indeed, that appears to have been the only plausible motive. What we have here is a battle over turf. The Arizona Marivilla gang considered Belvedere Park to be its territory. The victims, members of a rival gang, were in Arizona Marivilla territory and were shot by a member of the Arizona gang without any other provocation.

Defendant argues that evidence of gang membership was found to be prejudicial and irrelevant in People v. Cardenas (1982) 31 Cal.3d 897 [184 Cal.Rptr. 165, 647 P.2d 569] and People v. Perez (1981) 114 Cal.App.3d 470 [170 Cal.Rptr. 619]. However, here, unlike Cardenas and Perez, the evidence was far more relevant. In Cardenas the prosecution introduced evidence of gang membership to prove bias of defense witnesses, but bias had already been established by other testimony. We held that the admission of gang membership evidence was an abuse of discretion under Evidence Code section 352 because the evidence was of minimal probative value, cumulative, and extremely prejudicial. In Perez, the evidence of gang

membership had no relevance to any issue at trial. In this case, the court did not err in the admission of gang affiliation. *176

4. Exclusion of Evidence of Third Party Culpability.

(5a) Defendant contends that the trial court improperly excluded, pursuant to Evidence Code section 352, evidence of third party culpability as to the Wells murders. We find no abuse of the court's discretion to exclude such evidence.

Deputy Havercroft found a daily appointment book and two weekly planners at the Wells residence. The books contained many names and addresses. Two small pieces of paper were clipped to the daily appointment book. The names "Chato" and "Pelon" were written on one piece of paper, and the name "Moses Verduzco" was written on the other piece of paper. Defendant's nickname is "Chato."

The defense sought to prove that Ray Wells was the center of a violent criminal operation involving drugs and stolen cars and guns, and that any number of criminal accomplices or rivals could have killed him. Therefore, the defense sought to cross-examine Deputy Havercroft about the names found in the appointment book and weekly planners and to introduce those documents into evidence. After considerable argument and an offer of proof, the court ruled that the evidence was inadmissible because "it still does not point the finger at any individual nor does it rise at all above possible ground of suspicion."

(6) A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt. This rule does "not require that any evidence, however remote, must be admitted to show a third party's possible culpability. ... [E]vidence of mere motive or opportunity to commit the crime in another person, without

more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (People v. Hall (1986) 41 Cal.3d 826, 833 [226 Cal.Rptr. 112, 718 P.2d 99].)

(5b) The trial court properly found defendant's showing insufficient. The defense had no evidence of another person's actual motive to commit the crimes. Instead, the defense merely raised the possibility that others had a motive to kill Ray and Marlene Wells. Although the defense identified two persons with plausible motives, they had no direct or circumstantial evidence linking them to actual perpetration of the crimes.

The present case is similar to People v. Edelbacher (1989) 47 Cal.3d 983, 1017-1018 [254 Cal.Rptr. 586, 766 P.2d 1], where the defense sought to *177 introduce evidence concerning the victim's association with "Hell's Angel-type people" and drug dealers in order to prove that someone other than the defendant committed the crime. We affirmed the trial court's ruling that the evidence was inadmissible. It did not identify a possible suspect other than the defendant or link any third person to commission of the crime, or even establish an actual motive rather than a possible or potential motive.

Defendant's reliance on Crane v. Kentucky (1986) 476 U.S. 683 [90 L.Ed.2d 636, 106 S.Ct. 2142] is misplaced. That case bears no similarity to the facts of the present case. Crane involved the exclusion of testimony regarding the circumstances surrounding the taking of the defendant's confession. The Supreme Court held that the ruling had denied the defendant a fair opportunity to present a defense.

(7) As an additional basis for admission of this evidence defendant argues that the evidence was admissible pursuant to Evidence Code section 356. That argument is also unavailing.

Evidence Code section 356 provides in pertinent part: "Where part of an act, declaration, conversation, or writing is given in evidence ..., any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

Contrary to defendant's contention, Evidence Code section 356 did not require admission of the appointment book and weekly planners. Those books simply were not part of a writing given in evidence by the prosecution. While the prosecution introduced independent slips of paper that were clipped to the appointment book, the book and the weekly planners themselves were unnecessary to an understanding of the slips of paper.

5. Admissibility of Prior Conviction for Impeachment.

(8) Defendant contends that the trial court erred in ruling that his prior conviction for assault with intent to commit murder would be admissible for impeachment purposes. We do not agree. The court followed the analysis set forth in People v. Castro (1985) 38 Cal.3d 301 [211 Cal.Rptr. 719, 696 P.2d 111], interpreting article I, section 28, subdivision (f) of the California Constitution, which was enacted as part of Proposition 8 in 1982. It properly concluded that defendant's reliance on pre-Castro cases was not determinative and that defendant's conviction for assault with intent to commit murder involved moral turpitude. (People v. Olmedo (1985) 167 Cal.App.3d 1085, 1097-1098 [213 Cal.Rptr. 742].) The court then exercised its discretion under Evidence Code section 352, concluding that the probative value outweighed the prejudicial effect. The court noted that it could not assess the ***178** impact of the prior conviction on defendant's testimony because no offer of proof as to that testimony had been made. Contrary to defendant's contention, the court did not state that an offer of proof was required and, indeed, noted that California law did

not then require an offer of proof. [FN3] Because of the similarity of the prior to one of the charged crimes, the court offered to sanitize the prior by allowing reference to the conviction only as a prior felony conviction. It did not abuse its discretion in doing so. (See People v. Massey (1987) 192 Cal.App.3d 819, 825 [237 Cal.Rptr. 734].)

> FN3 We have since held that testimony by the defendant is a prerequisite to appellate review. (People v. Collins (1986) 42 Cal.3d 378, 383 [228 Cal.Rptr. 899, 722 P.2d 173].) The ruling here preceded our holding in Collins, which was to be applied prospectively only.

Defendant's reliance on pre-Castro and Proposition 8 cases is unpersuasive. (9) As we noted in People v. Castro, supra, 38 Cal.3d at page 312, the intention of the drafters of Proposition 8 was to "restore trial court discretion as visualized by the Evidence Code and to reject the rigid, black letter rules of exclusion" which had been grafted onto the code by our decisions. Accordingly, we find no abuse of discretion in the trial court's ruling.

6. Request for Ruling in Advance on Scope of Cross-examination of Defendant.

(10) Defendant contends that the trial court's refusal to rule on the scope of permissible cross-examination if he took the witness stand to testify on the Belvedere Park murders violated his right to testify on his own behalf.

Before the defense rested its case, defense counsel told the court that defendant wished to testify about the Belvedere Park incident on October 14, 1984, but that he did not wish to testify about the Wells murders on October 31, 1984. Counsel asked the court to limit any cross-examination of defendant to the Belvedere Park charges. Counsel indicated that defendant would testify on the issue of self-defense but gave no further

details as an offer of proof. Defense counsel argued that the two incidents were entirely separate and that the direct and cross-examination could therefore be limited to the Belvedere Park charges. The prosecution disagreed, asserting that there was evidentiary spillover regarding defendant's efforts to hide the beige and brown Monte Carlo in Verduzco's garage and Ray Wells's apparent knowledge of the transaction. The trial court refused to make a ruling in advance of defendant's actual testimony, stating "whether a defendant can effectively limit the cross- examination depends upon the direct examination and may not be known until he testifies. The law is that a defendant cannot artificially limit the cross- examination and direct examination." ***179**

Defendant has failed to show that the court's ruling was erroneous. None of the authorities cited is directly on point, and none would have required the ruling sought here. Indeed, there is authority supportive of the trial court's action. (See People v. Keenan (1988) 46 Cal.3d 478, 410-513 [250 Cal.Rptr. 550, 758 P.2d 1081]; People v. Williams (1988) 44 Cal.3d 883, 912- 913 [245 Cal.Rptr. 336, 751 P.2d 395].) The court acted well within its discretion.

7. Cross-examination of Dr. Trockman.

Dr. Donald Trockman, a forensic psychiatrist, testified as an expert witness for the defense in support of the self-defense claim as to the Belvedere Park counts. Dr. Trockman testified that there was a high correlation between ingestion of PCP and unpredictable violence and hostility. Based on his review of the autopsy report of Gilbert Martinez showing bruises and high levels of PCP and alcohol in his blood, Dr. Trockman concluded that at the time of his death, Martinez was in an angry, aggressive, violent mood. He could not reach any specific conclusion as to the mood of Anthony Aceves because he had lived for three days after the shooting.

On cross-examination Dr. Trockman testified that the mental state reached under the influence of alcohol is different from the mental state reached under the influence of PCP. The prosecutor reminded the doctor that he had testified differently in previous cases where the person was charged with being under the influence of PCP and asked the doctor whether his answer was dependent on his function in the particular case.

The prosecutor asked Dr. Trockman if Gilbert Martinez was in a violently aggressive mood during his entire period of PCP intoxication, and was told: "The important time. The time when he confronted the accused in this case." The prosecutor then asked how he knew the victim had confronted the accused and whether the defense had told him what he had to accomplish to dispel the prosecution case.

The prosecutor also asked Dr. Trockman whether, by his testimony, he tries to affect the outcome of a case. The prosecutor queried whether the witness instructed attorneys on the questions they should ask for dramatic effect, to maintain the interest of the jury, and to dispel inferences of defense bias.

During closing argument the prosecutor referred to the doctor's admission that he had testified differently in other cases about the distinction between alcohol and PCP intoxication. Based on the admission the prosecutor stated that the doctor "is a liar." ***180**

(11) Defendant contends that the prosecutor committed prejudicial misconduct in so questioning the doctor and in calling him a liar during closing argument. Although defendant objected to the questions on cross- examination, he raised no objection during argument to the prosecutor's use of the term "liar." Defendant has thus waived the latter point since any harm caused by this characterization could have been cured by a timely objection and an admonition. (People v. Green (1980)

27 Cal.3d 1, 27 [164 Cal.Rptr. 1, 609 P.2d 468].)

In any event, there was no prosecutorial misconduct. The prosecutor was entitled to question the doctor's testimonial consistency and possible bias. (People v. Meneley (1972) 29 Cal.App.3d 41, 60 [105 Cal.Rptr. 432].) Referring to testimony as "lies" is an acceptable practice so long as the prosecutor argues inferences based on the evidence and not on the prosecutor's personal belief. (People v. Edelbacher, supra, 47 Cal.3d 983, 1030.) Closing argument may be vigorous and may include opprobrious epithets when they are reasonably warranted by the evidence. In this case, the prosecutor's argument was based on the evidence and amounted to nothing more than vigorous yet fair argument. (Ibid.)

Defendant's reliance on People v. McGreen (1980) 107 Cal.App.3d 504 [166 Cal.Rptr. 360] (overruled on other grounds in People v. Wolcott (1983) 34 Cal.3d 92 [192 Cal.Rptr. 748, 665 P.2d 520]) is misplaced. In McGreen, the prosecutor attempted to discredit the expert witness by showing that he had received B and C grades in graduate school and that the witness's membership in certain scientific societies was a sham. The trial court eventually foreclosed further cross-examination on these grounds. The prosecutor nevertheless persisted in the line of questioning and additionally asserted that the witness's testimony had been stricken in another case because it was "patently unbelievable." When asked for authority to support the admission of such evidence of the witness's "unbelievability," the prosecutor admitted he had none. Additionally, during argument the prosecutor suggested there had been an ethics investigation of the witness and characterized the witness as an habitual liar who prostituted his credentials for $50 an hour. (Id. at pp. 514- 517.)

In no way was the cross-examination in this case comparable to that in McGreen. Here, the prosecutor elicited testimony

tending to show bias by questioning the witness about his contrary testimony in previous cases and his interest in helping the defense. Such cross-examination was proper. (See People v. Rich (1988) 45 Cal.3d 1036, 1088 [248 Cal.Rptr. 510, 755 P.2d 960].) ***181**

8. Cross-examination of Ralph Ortega.

Defendant contends the prosecutor committed multiple instances of prejudicial misconduct during the cross-examination of Ralph Ortega, defendant's alibi witness in the Wells case.

Ralph Ortega testified for the defense that he went with defendant, Eugene Valenzuela, and others to a small ranch in Tecate, Mexico on October 24, 1984. He testified further that he stayed four days and returned to Los Angeles while defendant remained at the ranch. Defendant was still there when Ortega returned around midnight on October 30. They stayed on at the ranch; defendant went with Ortega the next night, Halloween eve, to take Ortega's son trick-or-treating.

On cross-examination the prosecutor elicited from Ortega that he had been arrested about 5:45 a.m. on October 24, 1984, near the Mexican border. He established that Ortega was not released from custody until about 5 p.m. that evening. The prosecutor noted that this information had not been revealed during Ortega's testimony on direct examination and asked Ortega if defense counsel had tried to avoid this subject. The prosecutor made references to Ortega's decision to "fess up" because "I was on to you" and asked if defense counsel had explained to him that it was necessary to put defendant in Tecate around 10 or 11 a.m. on October 24. The prosecutor established that Ortega and his friends just "hung around" the ranch. The prosecutor also established that Ortega purchased and delivered food and supplies to defendant and Valenzuela during their entire stay in

Tecate.

The prosecutor asked Ortega if counsel had explained to him that he would be liable as an accessory after the fact if he ever admitted that he knew that defendant had committed the Belvedere Park murders at the time he took defendant to Tecate. Ortega said no and denied any knowledge that defendant was involved.

Later, when questioning Ortega about his knowledge of the seizure of the 1968 Chevrolet Caprice at the border, the prosecutor stated: "Are you going to stop your lying here in court?" Defense counsel objected to the prosecutor's yelling, but not to the question itself.

(12) Defendant contends that the prosecutor committed misconduct by repeatedly suggesting that defense counsel had colluded with Ortega in the fabrication of Ortega's alibi testimony. In our view, the record, as described above, does not support the assertion. Moreover, defendant has waived the point by failing to object and request a timely admonition. (People v. Green, supra, 27 Cal.3d at p. 27.) ***182**

(13) Defendant also claims that the prosecutor used his cross-examination of Ortega to express his own personal disbelief in Ortega's testimony. Defendant refers to the questions suggesting that Ortega was lying. Again, no objection was raised below, and the point is therefore waived since any harm could have been cured by a prompt admonition. (People v. Green, supra, 27 Cal.3d at p. 28.)

(14) Defendant asserts that the prosecutor improperly tried to impeach Ortega with evidence of a drug arrest. Ortega was arrested as an accessory to murder in this case, but he was released from custody after one day and charges were never filed. When questioning Ortega about his arrest in this case, the

prosecutor queried, "You were also arrested for something else, weren't you?" Defense counsel's objection was sustained. No admonition was requested or given. Under these circumstances, we fail to see how defendant could have been prejudiced by this question since the jury was already aware that Ortega had been arrested on the way to Tecate for possession of methamphetamines. Moreover, the jury was given the standard instruction (CALJIC No. 1.02) stating that a question is not evidence and that they should not guess what the answer might have been when an objection is sustained.

(15) Defendant also contends that the prosecutor improperly questioned Ortega about his failure to volunteer his exculpatory information to the police prior to trial. Defendant asserts that the prosecutor was aware that Ortega had been arrested as an accessory and had exercised his constitutional right to remain silent. Indeed, Ortega explained that he had never told the police about the alibi because he had refused to be interviewed. On redirect Ortega explained that he had given his exculpatory information to the defense attorneys and their investigator a year before the trial. Therefore, even assuming that the prosecutor's questioning in this area amounted to misconduct, we conclude that defendant suffered no significant prejudice as a result of it.

(16) Defendant complains about questions concerning remarks made in the elevator after Ortega's testimony on direct examination. The prosecutor, defense counsel, and Ortega had a conversation in the elevator as they left the courthouse. No jurors were present in the elevator. The following morning, defense counsel reopened direct examination and questioned Ortega about the conversation in the elevator. Ortega testified that the prosecutor threatened him and said "someone is going to jail behind this."

On cross-examination the prosecutor asked Ortega whether he

(the prosecutor) had made the alleged threat in response to a question asked by ***183** defense counsel. When Ortega answered yes, the prosecutor asked if defense counsel had said "Well, how do you guys like what happened in there today?" Defense counsel objected and denied making the statement. The objection was overruled. Ortega responded that he had heard defense counsel say only, "What's up?"

Defendant argues that the prosecutor's question was asked in bad faith. The claim is supported by nothing more than defendant's bald assertion. No police officers who overheard the conversation were called as witnesses by either the prosecution or the defense. Since the record contains no basis for branding the prosecutor's questioning as bad faith, we reject defendant's contention.

9. Prosecutor's Argument.

Defendant contends that the prosecutor committed prejudicial misconduct in a number of respects in addition to the claims that we have already discussed. (17a) First, defendant charges the prosecutor with improper attacks on defense counsel. During the course of his lengthy review of the testimony of virtually every witness, the prosecutor referred to attempts by defense counsel to mislead the jury and, at one point, accused defense counsel of perpetrating a fraud on the court. The prosecutor also referred to defense theories and evidence as "ridiculous" and "nonsense." Defendant interprets the prosecutor's characterization of the defense testimony as lies and concoctions, to be an accusation of defense fabrication of evidence. Defendant also complains about the prosecutor's repeated references to defense counsel's reaction to particular testimony.

(18) "A prosecutor may vigorously argue his case, marshalling the facts and arguing inferences to be drawn therefrom. (People

v. Fosselman (1983) 33 Cal.3d 572, 580 [189 Cal.Rptr. 855, 659 P.2d 1144].) We have held he may not express a personal belief in defendant's guilt, in part because of the danger that jurors may assume there is other evidence at his command on which he bases this conclusion. (People v. Bain (1971) 5 Cal.3d 839, 848 [97 Cal.Rptr. 684, 489 P.2d 564].) We have also held it improper for the prosecutor to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case. It is not necessary to find that such implication impinges upon defendant's constitutional right to counsel. (Compare People v. Turner (1983) 145 Cal.App.3d 658, 674 [193 Cal.Rptr. 614].) Instead it is sufficient to note that defendant's conviction should rest on the evidence, not on derelictions of his counsel. (People v. Perry (1972) 7 Cal.3d 756, 790 [103 Cal.Rptr. 161, 499 P.2d 129]; Bain, supra, 5 Cal.3d at p. 847.) Casting uncalled for aspersions on defense ***184** counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences to be drawn therefrom." (People v. Thompson (1988) 45 Cal.3d 86, 112 [246 Cal.Rptr. 245, 753 P.2d 37].)

(17b) Defendant objected to many, but not all, of the cited instances. For the most part, his objections were overruled. The court did, however, sustain his objection to the accusation of perpetrating a fraud on the court. It admonished the jury to disregard the comment, stating that there had been no perpetration of a fraud by any lawyer in this case. While we agree that many of the cited remarks were improper, we do not find them to have been prejudicial. The prosecutor was entitled to argue the inconsistencies in the evidence and even to characterize inconsistent testimony as "lies." (See People v. Edelbacher, supra, 47 Cal.3d at p. 1030.) Here, however, the prosecutor went beyond that point on several occasions, denigrating counsel instead of the evidence. Personal attacks on opposing counsel are improper and irrelevant to the issues. The prosecutor's reference to counsel's reaction to particular

evidence was also improper for the same reason, but we do not interpret it as a charge of fabrication of evidence. All of these remarks were a small part of the prosecutor's very lengthy review of the evidence presented. They were clearly recognizable as an advocate's hyperbole. (See People v. Poggi, supra, 45 Cal.3d at p. 340.) Accordingly, we find no reasonable probability that the jury would have reached a more favorable result absent the objectionable comments. (People v. Green, supra, 27 Cal.3d at p. 36.)

(19) Defendant also contends that the prosecutor committed misconduct because he expressed personal opinions regarding the defense case. Defendant refers to the prosecutor's statement that "I shake my head in disbelief every time I think about it [Ralph Ortega's testimony]." Defendant also makes reference to the prosecutor's statement: "They know the defendant killed those boys. And they know he killed Ray and Marlene Wells." Finally, defendant complains about the prosecutor's argument about the disparities between defense promises of proof in the opening statement and the trial evidence. Defendant waived all but the first point by failing to raise a timely objection at trial. (People v. Green, supra, 27 Cal.3d at p. 27.) As to the first point, the remark was made in the context of reviewing the discrepancies in defense testimony and was not likely to be understood as being based on anything outside the record.

(20) Defendant further charges that the prosecutor committed misconduct by referring to defendant's failure to testify at trial. The prosecutor argued that he forestalled defense testimony by preemptively proving that *185 defendant did not need glasses at the time of the Belvedere Park offenses: "I should not have proved to you earlier in the trial that he didn't need glasses at the time in the park, because then you would have heard, 'Well, I was in the park, and you can see all the witnesses say I didn't have any glasses on. And I saw one guy go do my friend in with a knife. And another one came to me, and I thought he was

going to do me in. I ran over to help my friend and shot him, and I shot him twice. I saw the other one. I couldn't see good who was doing what to me, so I shot him. And the other one coming at me, I shot him, too, because I just couldn't see good.' That's what you would have heard." A defense objection under Griffin v. California (1965) 380 U.S. 609 [14 L.Ed.2d 106, 85 S.Ct. 1229] (Griffin) was sustained, and the court admonished the jury to disregard the prosecutor's comments to the extent they reflected on the defendant's not testifying. The prosecutor referred to the glasses again in his rebuttal, stating: "And I argued in my opening argument the fact that you would hear or you would have heard, had we given them a little rope to hang themselves, also you would have heard, 'Well, I couldn't see. I didn't have my glasses on, so therefore that's why I shot this person and I had to shoot this person.' " The defense objection was overruled.

We believe that the court's initial admonition was sufficient to obviate any Griffin concern. To the extent that the rebuttal comment could be construed as a reference to defendant's failure to testify, in context, it was clearly harmless. The reference was a minor feature in this seemingly marathon argument.

(21) Defendant contends that the prosecutor committed misconduct by referring to defendant's courtroom appearance (wearing a suit, wearing reading glasses, being clean-shaven) as a "ploy" and by asserting that defendant did not need to wear the glasses all the time during the trial. Defendant waived these points by failing to object at trial, since any harm could have been cured by timely objection and prompt admonition. (People v. Green, supra, 27 Cal.3d at p. 27.) In any event, these statements could not have had a prejudicial effect in light of the overwhelming evidence of the Belvedere Park killings.

In sum, we find no denial of due process or a fair trial as a result

of any misconduct committed by the prosecutor. Both sides seemed unduly argumentative and personal on occasion, but such instances were not so frequent or severe as to detract from the jury's fair consideration of the evidence.

10. Instruction on Reasonable Doubt.

In a supplemental brief, defendant argues that the instruction on reasonable doubt, CALJIC No. 2.90, is constitutionally flawed, citing Cage v. ***186** Louisiana (1990) 498 U.S. 39 [112 L.Ed.2d 339, 111 S.Ct. 328]. Similar challenges to CALJIC No. 2.90 were raised and rejected in People v. Jennings (1991) 53 Cal.3d 334, 385-386 [279 Cal.Rptr. 780, 807 P.2d 1009] and People v. Johnson (1992) 3 Cal.4th 1183, 1234-1235 [14 Cal.Rptr.2d 702, 842 P.2d 1]. As we noted in Jennings and Johnson, despite use of the term "moral certainty" in CALJIC No. 2.90, the instruction does not suffer from the flaws condemned in Cage v. Louisiana, supra, 498 U.S. 39.

Defendant also cites Justice Mosk's criticism of CALJIC No. 2.90 in his concurring opinion in People v. Brigham (1979) 25 Cal.3d 283, 292-316 [157 Cal.Rptr. 905, 599 P.2d 100]. Recognizing that CALJIC No. 2.90 is a verbatim copy of section 1096, Justice Mosk urged the Legislature to redraft the definition of reasonable doubt in section 1096 to make it intelligible to modern juries. The Legislature has not responded. As Justice Mosk recognized, such changes must come from the Legislature.

Penalty Phase Facts
Evidence in Aggravation.

The penalty case-in-aggravation consisted of evidence of three prior crimes by defendant: 1) a 1978 assault upon a police officer; 2) a 1979 conviction of assault with intent to commit murder; and 3) a 1985 assault on a fellow jail inmate.

1. 1978 Assault.

Deputy Sheriff Randall Prestwich testified that on May 13, 1978, he and his partner heard gunshots in the vicinity of Arizona Street in Los Angeles. They saw defendant and two other men run from a house. Defendant had a shotgun. Deputy Prestwich yelled at the men to freeze. The other two ran off, and defendant brought the gun up to his waist and flinched, as if he expected the gun to go off. Deputy Prestwich fired a shot at defendant and saw defendant flinch again. Defendant turned and ran. Deputy Prestwich caught him and arrested him for assault on a police officer.

2. 1979 Assault.

Ernest Leos testified that on March 17, 1979, he and his son were in their driveway when Jesse Trujillo's car stopped in front of the driveway. Leos's son, Ernest, Jr., went over to the car and was shot while talking to someone in the car. Defendant was convicted of assault with intent to commit murder for this shooting. ***187**

3. 1985 Assault.

Deputy Sheriff Kenneth Salazar testified that on March 21, 1985, defendant was working as a trusty in the high security section of Los Angeles County jail. After defendant had finished passing out and collecting breakfast trays, he was ordered back to his cell so that Guy Walker could leave his cell to take a shower. Walker received a razor blade and soap and went into the shower. Defendant was then released from his cell to complete his duties.

Deputy Lujan saw defendant run into the shower area, approach Walker, and move his fist toward Walker's head. Deputy Salazar saw defendant run from the shower area to the toilet

area. As he followed defendant, Deputy Salazar saw Guy Walker slumped on the floor with blood on his face. Deputy Salazar heard a toilet flush. When he reached the toilet area, defendant was standing over a toilet. Deputy Salazar found a small piece of razor in the doorway leading to the toilet area. Walker's injuries could have been caused by a razor blade.

Evidence in Mitigation.

1. Walker Incident.

Guy Walker testified for defendant. He and defendant had several arguments in March 1985 because defendant had been named trusty and had the cell Walker wanted. Walker tried to cut defendant's throat and to stab him. That same week, defendant entered the shower area and they fought.

2. In-custody Behavior.

Deputy Sheriffs Ronald Hernandez and Anthony Campbell, assigned to the Los Angeles County jail, had never had problems with defendant. Defendant was helpful and friendly, and both deputies voted for him to be appointed a jail trusty.

3. Defendant's Family and Friends.

Patricia Solis struck up a friendship with defendant after she had been dismissed as a prospective juror in the case. She described defendant as an intelligent and sensitive person, who cared about other people, and loved his children.

Edward Dominguez had known defendant since 1976, when he opened his liquor store in the neighborhood. Defendant was always a gentleman and, on one occasion, prevented a fight in the store. ***188**

Richard Rodriguez, a gang consultant affiliated with the

California Youth Authority, testified that although Arizona Marivilla was once a street gang, since 1982 it had been incorporated as a neighborhood association. Defendant participated in the youth program when he was released from prison in May 1984.

Defendant's wife and son described him as a nice, lovable man who is a good father.

Defendant's mother, Elizabeth Luna, testified that defendant's father, who had been abusive to her and the children, died when defendant was six or seven. Luna then "went wild," and began drinking and partying. Defendant became "the man of the house" upon his father's death, and he took care of his four brothers and sisters, even stealing on occasion so they could eat.

Penalty Phase Contentions

1. Evidence of Gang Affiliation.

(22) Defendant contends that the erroneous admission of his gang affiliation in the guilt phase prejudiced him in the penalty phase because he had to call Richard Rodriguez to rebut that evidence and the prosecutor improperly cross-examined him.

As previously noted, Richard Rodriguez testified in mitigation that the Arizona Marivilla gang, which had been violent, was reformulated in 1982 as a neighborhood association with the goal of keeping the peace. He testified that after defendant left prison in 1984 he was not involved in gang activities and that defendant was working to keep young people out of gangs. On cross- examination the prosecutor asked Rodriguez if it was true that Arizona Marivilla was one of the most violent gangs in East Los Angeles and responsible for most of the murders in that area from 1975 to 1985. The prosecutor also asked if defendant was one of the most active members.

We find no error. First, we have already concluded that the evidence of defendant's gang membership was properly admitted at the guilt phase. Second, the prosecutor was entitled to attempt to negate the evidence in mitigation to the effect that the Arizona Marivilla was now simply a peaceful neighborhood association. (People v. Thompson, supra, 45 Cal.3d at p. 124.) (23) It is well established that the prosecution may inquire of a defense reputation witness whether he has heard of acts or conduct by the defendant inconsistent with the witness's testimony so long as the People have a good faith belief that the acts or conduct about which they wish to inquire actually ***189** took place. (People v. Siripongs (1988) 45 Cal.3d 548, 578 [247 Cal.Rptr. 729, 754 P.2d 1306].)

2. Consideration of Defendant's Age.

(24) Defendant contends that the jury was improperly allowed by the court and prosecutor to consider his age as a factor in aggravation. Defendant was 26 at the time of the offenses. The court rejected defendant's special instruction stating that if defendant's age were to be considered, it could be considered only as a mitigating factor. The court gave CALJIC No. 8.84.1, which permitted the jury to consider "the age of the defendant at the time of the crime" in determining the appropriate penalty.

During the penalty argument, the prosecutor reviewed the factors listed in CALJIC No. 8.84.1 and argued: "The age of the defendant at the time of the crime. He is obviously old enough to know the difference between right and wrong, and that's aggravation."

Defendant acknowledges that we have rejected attacks on the instruction given. (See, e.g., People v. Rodriguez (1986) 42 Cal.3d 730, 777-779 [230 Cal.Rptr. 667, 726 P.2d 113]; People v. Lucky (1988) 45 Cal.3d 259, 301-302 [247 Cal.Rptr. 1, 753 P.2d 1052].) As we noted in People v. Lucky, supra, at page

302, mere chronological age should not of itself be deemed either aggravating or mitigating: "In our view, the word 'age' in statutory sentencing factor (i) is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-related inference in every case." (Ibid.)

The court did not err in rejecting defendant's proposed special instruction, since it stated that inferences relating to defendant's age could be considered only as a mitigating factor. Nor was there any impropriety in the prosecutor's argument. The prosecutor's argument that defendant was old enough to know better, thus making it aggravating, is an age-related inference that has been found permissible in a number of cases. (See People v. Bonin (1988) 46 Cal.3d 659, 704-705, fn. 6 [250 Cal.Rptr. 687, 758 P.2d 1217]; People v. Brown (1988) 46 Cal.3d 432, 456-457 [250 Cal.Rptr. 604, 758 P.2d 1135].)

Defendant urges us to reexamine our construction of the age factor in People v. Lucky, supra, 45 Cal.3d 259 and succeeding cases, arguing that the unfettered discretion regarding how the factor is to be considered renders it unconstitutional under the principles of Gregg v. Georgia (1976) 428 U.S. 153 [49 L.Ed.2d 859, 96 S.Ct. 2909] and Maynard v. Cartwright (1988) 486 ***190** U.S. 356 [100 L.Ed.2d 372, 108 S.Ct. 1853]. We rejected a similar argument in People v. Babbitt (1988) 45 Cal.3d 660, 716 [248 Cal.Rptr. 69, 755 P.2d 253] and are not persuaded that we should reexamine that reasoning. (See also People v. Edwards (1991) 54 Cal.3d 787, 844 [1 Cal.Rptr.2d 696, 819 P.2d 436].)

3. Reference to Suffering by Victims and Their Families.

(25) Defendant contends that the prosecutor violated Booth v. Maryland (1987) 482 U.S. 496 [96 L.Ed.2d 440, 107 S.Ct.

2529] and South Carolina v. Gathers (1989) 490 U.S. 805 [104 L.Ed.2d 876, 109 S.Ct. 2207] by urging the jury to consider characteristics of the victims and the loss suffered by the victims' families. The allegedly objectionable references were made in response to defense counsel's argument that the jury should consider defendant's difficult childhood, including the fact that he had to become the man of the house at the age of eight, as illustrated by a photograph of defendant at his father's funeral. [FN4]

> FN4 Defendant's mother testified that defendant was six or seven when his father died. The prosecutor, however, referred to defendant as having been eight at the time of his father's death.

The prosecutor stated: "I want you to think about this. I want you to look at this picture very hard. When you have got it back there in that room look at it. How hurtful it was at the time or hurtful it is when you see it years later. But remember the Aceves family. Replace all these faces. Put Anthony Aceves in the casket.

"Put Anthony Aceves in that casket. Put his family around it. Because it happened two years ago they are not victims? They are hurt. He should be given compassion? The way he executed that boy?

"Think about the parents and the family of Gilbert Martinez. When they were standing around his casket and they were crying and they were saying 'My God, how could this happen to my child?'

"Marlene Wells. When she was on the ground and the defendant was standing over her and putting two bullets in the back of her head just before she is looking up at him. 'Don't kill me.' Begging for her life. And he shoots her brutally in the back of

the head.

"Think about it. They are funerals. Every time you look at this funeral photograph produced by the defense you think of their funerals. You think of their families. And you are called upon to impose death in cases like this when it's so aggravated. How many people must he kill?" *191

During the pendency of this appeal, both Booth v. Maryland, supra, 482 U.S. 496 and South Carolina v. Gathers, supra, 490 U.S. 805, were largely overruled. In Payne v. Tennessee (1991) 501 U.S. ___ [115 L.Ed.2d 720, 111 S.Ct. 2597], the United States Supreme Court held that the use of victim impact evidence does not offend the Eighth Amendment guaranty of an individualized penalty assessment in a capital trial. We have since held that the injury inflicted by the defendant-including evidence about the victim and the impact of the crime on the victim's family-is one of the circumstances of the crime, evidence of which is admissible under section 190.3, factor (a). (People v. Edwards, supra, 54 Cal.3d 787, 833-836; People v. Fierro (1991) 1 Cal.4th 173, 234-235 [3 Cal.Rptr.2d 426, 821 P.2d 1302].)

The prosecutor's remarks were permissible under the principles set forth in Payne v. Tennessee, supra, 501 U.S. ___ [115 L.Ed.2d 720, 111 S.Ct. 2597] and People v. Edwards, supra, 54 Cal.3d 787. Accordingly, defendant's claim must be rejected.

4. Biblical References.

Defendant contends that the prosecutor violated his rights to due process, a fair trial, separation of church and state, and freedom from cruel and unusual punishment by quoting biblical authority in his final argument. We agree that the prosecutor's argument was improper, but we conclude that it does not require reversal of the penalty judgment.

During final argument, defense counsel stated, inter alia: "It seems almost to be in the theater of absurd to be talking about life and death. I don't know what gives me the right to talk about it .... [¶] What we have to really talk about is values, purpose. You have to confront yourselves in terms of your own feelings, what you demand from society, what you really demand from Mr. Sandoval, what you demand from yourselves. [¶] Revenge? That's really what we're talking about. When you convicted Mr. Sandoval of these four murders and found the special circumstances to be true, you already guaranteed one thing. Fred Sandoval will die in the penitentiary is one of them in the State of California. Period. He will never come out. He will die in the penitentiary. [¶] The question is is he going to die whatever it is in three years in the gas chamber or is he going to die of old age in the pen or is he going to die because someone stabs him in the back in the penitentiary? But the reality is that he is going to die in the penitentiary. That's already been decided and you decided that.

"And in facing you again and thinking about that and thinking about how hard your job is, how difficult your job is, in reality you could sit, play God *192 to an individual. ... [¶] In some sense, I really don't know which is worse, execution or the gas chamber or that kind of life in prison. But you have that power alone. Any one of you can stop the execution alone. You have that power. I have never held that awesome power of holding a person's life in my hands. You have that power. You alone. [¶] You also have that responsibility that you are going to carry for the very rest of your life whether you push that button or not. And the bottom line is it's revenge. Because society to you because you are society, you want to extract revenge. Or is it bad enough to stop it and let this man live out his life in prison? ... [¶] I have come to grasp it now. I looked at you in the eye and you can look back at me. Doesn't change anything. Nothing will bring back Anthony Aceves and Gilbert Martinez and the two Wells. Nothing. Won't change. Bottom line is revenge. Just

pure and simple. Vengeance.

"If that's what you want, that's what you felt, you push the button. An eye for an eye, a tooth for a tooth, a stripe for a stripe, a life for a life. [¶] I don't think society requires revenge. I don't think that you require revenge. An eye for an eye. [¶] Ghandi [sic] said we do this eye for an eye thing, make society require it and do it, what happens is the whole world becomes blind. The light is shut out. That's not right. Don't shut out the light. Don't make the world blind. Don't push that button."

The prosecutor responded to defense counsel's argument by stating: "He told you that it's absurd to talk about life and death, that the law is absurd, that you are playing God, that it's revenge. [¶] And that is to get you, of course, to vote for life without the possibility of parole. Well, death is a legitimate means of punishment in this state. It's available in this state. You are called upon to impose it if you think it's appropriate. You are a cross section of the community. People are judged by a jury of their peers. You make that determination whether the defendant should get the death penalty or life without the possibility of parole. The defense wants to make that burdensome for you. [']Each and everyone [sic] of you from here on must live with that decision. Push that button over there. You must live with that decision for the rest of your life.['] [¶] Well if it wasn't you called upon to carry out the will of the People of the State of California, would have been another jury, because that's our system. That's how the law is affected in this state. [¶] Don't once think that you have to feel burdened and depressed because I voted for death. You are doing what the law says if it's substantial, the aggravation substantially outweighs the mitigation. Don't listen to this lawyer talk. ..."

"Mr. Applebaum says don't play God. Let every person be in subjection to the governing authorities for there is no authority

except from God and those *193 which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear or authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an Avenger who brings wrath upon one who practices evil. [¶] You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right. ... [¶] ... Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."

(26a) Defendant asserts that the material in the previous paragraph was a paraphrase of Romans 13:1-7 and that such reliance on biblical authority to advocate imposition of the death penalty is improper. We agree.

The People seek to justify the argument as having been appropriate rebuttal to defense counsel's argument. While the question is close, we are of the opinion that the prosecutor's argument crossed the line of permissible argument and rebuttal. There are situations in which the prosecutor has been allowed to make comments in rebuttal that would otherwise be improper, when such comments are fairly responsive to the argument of defense counsel. (See People v. McDaniel (1976) 16 Cal.3d 156, 177 [127 Cal.Rptr. 467, 545 P.2d 843] and People v. Hill (1967) 66 Cal.2d 536, 560 [58 Cal.Rptr. 340, 426 P.2d 908]; see also United States v. Robinson (1988) 485 U.S. 25, 31-34 [99 L.Ed.2d 23, 30-33, 108 S.Ct. 864].) This, however, is not such a situation.

Here, the prosecutor paraphrased a passage of the Bible that is

commonly understood as providing justification for the imposition of the death penalty. Such argument is improper. "The closing statements of counsel should relate to the law and the facts of the case as each side interprets them." (People v. Hawthorne, ante, 43, at p. 60 [14 Cal.Rptr.2d 133, 841 P.2d 118].) Though not expressly identified as such, the passage was unmistakably biblical in style and readily recognizable by persons schooled in the Christian religion. The prosecutor "may state matters not in evidence that are common knowledge, or are illustrations drawn from common experience, history, or literature." (People v. Love (1961) 56 Cal.2d 720, 730 [16 Cal.Rptr. 777, 366 P.2d 33].) He may not, however, invoke higher or other law as a consideration in the jury's sentencing determination. (Jones v. Kemp (N.D.Ga. 1989) 706 F.Supp. 1534, 1559; Commonwealth v. Chambers (1991) 528 Pa. 558 [599 A.2d 630, 644].) The argument here was clearly improper by exhorting the jury to consider factors outside section 190.3 in making its penalty determination. ***194**

(27) Penalty determinations are to be based on the evidence presented by the parties and the legal instructions given by the court. Reference by either party to religious doctrine, commandments or biblical passages tending to undermine that principle is improper. We recognize that the defense must be allowed some latitude in its presentation of mitigating evidence. Nevertheless, we do not understand that latitude to include exhortation of religious canons as a factor weighing against the death penalty. If the defense were to present such argument, it would be subject to objection by the prosecution and possible like-kind argument in rebuttal. (See United States v. Robinson, supra, 485 U.S. at pp. 31-34 [99 L.Ed.2d at pp. 30-33].) What is objectionable is reliance on religious authority as supporting or opposing the death penalty. The penalty determination is to be made by reliance on the legal instructions given by the court, not by recourse to extraneous authority. (Jones v. Kemp, supra, 706 F.Supp. 1534, 1559.) We do not mean to rule out all

reference to religion or religious figures so long as the reference does not purport to be a religious law or commandment.

(26b) Though we have found that the argument in this case constituted misconduct, we do not find that it requires reversal of the penalty judgment. The jurors deliberated for four days before indicating that they were split six to six on two counts and five to seven on the other two. After further deliberations the next day, they returned verdicts of life without possibility of parole on three of the counts and death on only one of the counts. Under these circumstances, we find no reasonable possibility that the jury would have reached more favorable verdicts had the misconduct not occurred. (See People v. Brown, supra, 46 Cal.3d 432, 448-449.) The result is the same under the federal Chapman test (Chapman v. California (1968) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065]).

5. Jury Deadlock.

Defendant contends that the trial court coerced the jury's verdict by requiring it to continue deliberating after the jury had declared a deadlock.

The jury retired for its penalty deliberations at 1:10 p.m. on Thursday, March 12, 1987, and deliberated until 2:45 p.m. Deliberations continued at 8:05 a.m. on Friday morning until the court recessed the jury at 11:45 a.m. to allow counsel time to submit argument on the appropriate response to a question submitted by the jury. The jury had been given separate verdict forms for each victim and it asked whether it could find that different penalties are applicable to different counts. On Monday morning, March 16, 1987, the court responded to the jury's question by stating, "you should reach a verdict as to each count if you can." At 8:50 a.m. the jury resumed ***195** deliberations and continued until court was adjourned at 1:30

p.m. Deliberations continued on Tuesday, March 17, for an hour and a half. After deliberating two and a half more hours the next morning, March 18, the jury sent the court a note stating, "We cannot reach a verdict. How do you proceed from this point on, and what would you like us to do?" The court called the jury out and asked the foreman whether there was "any reasonable possibility, and I emphasize the word 'possible' that the jury can arrive at a verdict as to any count given further deliberations, the rereading of any testimony or the answering of any question that I can answer?" The foreman answered, "No. We have discussed that possibility, and we don't believe that we can reach a verdict." The court then asked for the jury division on each count and was told that it was six to six on count 1, six to six on count 2 five to seven on count 3, and five to seven on count 4. The court then polled each juror as to "whether you think there is a reasonable possibility with further deliberations you can arrive at a verdict as to any of the counts," and each juror replied, "No."

In a conference outside the jury's presence, the court indicated that it wanted the jury to spend a little more time and that it would probably declare a mistrial if the jury did not reach a verdict the next day. The court estimated that the jury had deliberated for about three full days and noted that a little more time would not be unreasonable in light of the fact that the trial had lasted five months. The court released the jury for that day with directions to return at 7:45 a.m. the next morning. After further deliberations the next morning, Thursday, March 19, 1987, the jury returned its verdicts of life without possibility of parole as to counts 1, 2 and 3, and a verdict of death as to count 4.

Section 1140 provides: "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the

minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

(28) "The determination whether there is reasonable probability of agreement rests in the discretion of the trial court. (People v. Miller (1990) 50 Cal.3d 954, 993 [269 Cal.Rptr. 492, 790 P.2d 1289]; People v. Sheldon (1989) 48 Cal.3d 935, 959 [258 Cal.Rptr. 242, 771 P.2d 1330]; People v. Rodriguez (1986) 42 Cal.3d 730, 775 [230 Cal.Rptr. 667, 726 P.2d 113]; People v. Rojas (1975) 15 Cal.3d 540, 546 [125 Cal.Rptr. 357, 542 P.2d 229, 92 A.L.R.3d 1127]; People v. Carter (1968) 68 Cal.2d 810, 817 [69 Cal.Rptr. 297, 442 P.2d 353].) The court must exercise its power, however, ***196** without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' (People v. Carter, supra, 68 Cal.2d at p. 817.)" (People v. Breaux (1991) 1 Cal.4th 281, 319 [3 Cal.Rptr.2d 81, 821 P.2d 585].) The question of coercion is necessarily dependent on the facts and circumstances of each case. (Ibid.)

(29) Defendant argues that the length of time the jury had been deliberating demonstrates that the jury had given careful consideration to the evidence and that a mistrial would have been warranted. (Compare People v. Rich, supra, 45 Cal.3d 1036, 1117 [court declined to declare mistrial on penalty after jury declared itself unable to reach verdict following only one hour of deliberation].) Defendant also cites the virtually even split and the jurors' individual statements against the usefulness of further deliberations as indicating that the court should have declared a mistrial. None of these factors, however, removed the court's discretion to require further deliberations. The jury had deliberated a similar amount of time in People v. Breaux, supra, 1 Cal.4th 281, 317-320, when it was asked to continue even though all of the jurors were negative on the prospects of a verdict. In People v. Rodriguez, supra, 42 Cal.3d 730,

774-777, we found no abuse of discretion in requiring the jury to continue deliberating after it declared itself unable to reach a verdict following 18 days of deliberation.

As further evidence of his claim that the verdict was coerced, defendant points to the facts that the order to continue deliberations was unaccompanied by further explanation and that the verdicts were reached shortly thereafter. The form of the verdicts-three for life and one for death-is also cited as evidence of "considerations of compromise and expediency" (People v. Carter, supra, 68 Cal.2d at p. 817) rather than independent judgment. We are not persuaded. Other explanations for the difference in the verdicts are readily apparent. The jury may have felt that only one death verdict was necessary and that the killing of Marlene Wells was most egregious since she had had no involvement with defendant. Thus the difference in the verdicts may be explained by the difference in the circumstances of the crimes. Defendant's assertion that the verdicts should have been uniform is based on the incorrect premise that the aggravating and mitigating circumstances were the same as to each count. They were not. Each murder had its own set of circumstances, which qualified for consideration under factor (a) of section 190.3.

Nothing in the record suggests that the jury was coerced in any way. The court made no statements that could be interpreted as exerting pressure on any juror. The court viewed the jury as a responsible group that took its duty seriously. The court was not unreasonable in concluding that, in light of the *197 fact that the trial itself had taken some five months, the jury should put in a little more time than the fourteen and one-quarter hours it had deliberated up to that point. The record shows no abuse of discretion.

6. Separate Verdict Forms.

(30) Defendant contends that the trial court erred in requiring the jury to return a separate penalty verdict as to each murder victim. Defendant argues that the multiple verdicts obscured the overriding constitutional value of reaching a comprehensive determination of the appropriateness of the death penalty considering all aggravating and mitigating circumstances and invited compromise verdicts. He also claims that the multiple penalty verdicts placed undue emphasis on the characteristics and status of the individual victims, relying on Booth v. Maryland, supra, 482 U.S. 496 and South Carolina v. Gathers, supra, 490 U.S. 805. We are not convinced.

A defendant who kills more than one person may be convicted and punished for each murder. (People v. Andrews (1989) 49 Cal.3d 200, 225 [260 Cal.Rptr. 583, 776 P.2d 285]; People v. Ramos (1982) 30 Cal.3d 553, 587 [180 Cal.Rptr. 266, 639 P.2d 908].) Separate penalty verdicts have been returned in other capital cases. The defendant in People v. Bittaker (1989) 48 Cal.3d 1046 [259 Cal.Rptr. 630, 774 P.2d 659] was convicted of first degree murder of five victims and was given separate death verdicts as to each murder victim. (Id. at pp. 1106, 1110, fn. 34.) Likewise, the defendant in People v. Mattson (1990) 50 Cal.3d 826 [268 Cal.Rptr. 802, 789 P.2d 983], who was convicted of the first degree murder of two girls, was given a separate verdict of death as to each murder victim. (Id. at p. 838.) We are not persuaded that there is any impropriety in requiring the jury to return a separate penalty verdict for each capital murder count.

7. Standard for Imposition of Death.

(31) The court gave CALJIC No. 8.84.2 (1986 rev.) on the standards for determining the penalty verdicts. Defendant objects to the following language in that instruction: "To return a judgment of death, each of you must be persuaded that the aggravating factors are so substantial in comparison with the

mitigating factors that it warrants death instead of life in prison without parole." Defendant complains that the instruction did not inform the jury that a necessary condition for imposition of the death penalty is a finding that aggravation outweighs mitigation rather than merely being "so substantial in comparison."

We rejected a similar challenge to this language in People v. Breaux, supra, 1 Cal.4th at pages 315-316. There, as in this case, the language in ***198** question was preceded by instructions that provide: "The weighing of aggravating and mitigating factors does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various ... factors you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of aggravating factors with the totality of the mitigating factors." The instructions given, in our view, were sufficient to inform the jury that it could return a death verdict only if the aggravating circumstances outweighed the mitigating circumstances.

8. Cumulative Error.

Defendant contends that the cumulative effect of errors during the penalty phase trial requires reversal of the penalty. Since we have found only one error in the penalty phase, there is no cumulative effect.

Conclusion

The judgment is affirmed.

Lucas, C. J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred.

MOSK, J.,

Concurring and Dissenting.

I concur in the judgment as to guilt, death eligibility, and noncapital sentence. After review, no error or other defect is evident requiring reversal or vacation on any of these issues.

I dissent, however, from the judgment as to the sentence of death. As will appear, there was prejudicial prosecutorial misconduct bearing on this question.

I

In summation at the penalty phase, defense counsel urged the jury to fix the penalty for defendant at life imprisonment without possibility of parole.

By contrast, the prosecutor asked for death. In the course of his argument, he made the following comments.

"I want to respond to some of the things argued by [defense counsel]. He told you that it's absurd to talk about life and death, that the law is absurd, that you are playing God, that it's revenge. *199

"And that is to get you, of course, to vote for life without the possibility of parole. Well, death is a legitimate means of punishment in this state. It's available in this state. You are called upon to impose it if you think it's appropriate. You are a cross section of the community. People are judged by a jury of their peers. You make that determination whether the defendant should get the death penalty or life without the possibility of parole. The defense wants to make that burdensome for you. [']Each and everyone [sic] of you from here on must live with that decision. Push that button over there. You must live with

that decision for the rest of your life.[']

"Well, if it wasn't you called upon to carry out the will of the people of the State of California, would have been another jury, because that's our system. That's how the law is affected in this state.

"Don't once think that you have to feel burdened and depressed because I voted for death. You are doing what the law says if it's substantial, the aggravation substantially outweighs the mitigation. Don't listen to this lawyer talk.

"

. . . . . .

"[Defense counsel] says don't play God. [']Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an avenger who brings wrath upon one who practices evil.[']

"You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right. ...

"

. . . . . .

"... Let him have the opportunity to get his soul right. That's the

only way to get his attention. You are not playing God. God ordains authority."

At this point, defense counsel objected and asked to approach the bench, but met with summary denial. ***200**

II

"It is of course misconduct for a prosecutor to invoke purported religious law in support of the imposition of the penalty of death." (People v. Hill (1992) 3 Cal.4th 959, 1016 [13 Cal.Rptr.2d 475, 839 P.2d 984] (conc. opn. of Mosk, J.); accord, People v. Wrest (1992) 3 Cal.4th 1088, 1107 [13 Cal.Rptr.2d 511, 839 P.2d 1020].)

"Argument of this sort by a representative of the government offends California statutes and judicial decisions, which establish the positive, secular law of this state as the rule governing the choice between life and death (see People v. Mincey (1992) 2 Cal.4th 408, 483-484 [6 Cal.Rptr.2d 822, 827 P.2d 388] (conc. & dis. opn. of Mosk, J.)). It also violates the United States and California Constitutions-including their respective clauses concerning establishment of religion (U.S. Const., Amend. I; Cal. Const., art. I, § 4), cruel and unusual punishments (U.S. Const., Amend. VIII; Cal. Const., art. I, § 17), and due process of law (U.S. Const., Amend. XIV; Cal. Const., art. I, § 15)." (People v. Hill, supra, 3 Cal.4th at pp. 1016-1017 (conc. opn. of Mosk, J.); see also People v. Wrest, supra, 3 Cal.4th at p. 1107 [holding that "such an argument tends to diminish the jury's sense of responsibility for its verdict and to imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions"].)

"It is well settled that religion may not play a role in the sentencing process." (Jones v. Kemp (N.D.Ga. 1989) 706 F.Supp. 1534, 1559; accord, People v. Mincey (1992) 2 Cal.4th

408, 485 [6 Cal.Rptr.2d 822, 827 P.2d 388] (conc. & dis. opn. of Mosk, J.); see People v. Wrest, supra, 3 Cal.4th at p. 1107.)

The jury has "a duty to apply the law of the [jurisdiction] as given by the trial judge, not its own interpretation of the law or its own interpretation of precepts of the Bible, in determining whether the [defendant] should live or die." (Jones v. Kemp, supra, 706 F.Supp. at p. 1559; accord, People v. Mincey, supra, 2 Cal.4th at p. 485 (conc. & dis. opn. of Mosk, J.); see People v. Wrest, supra, 3 Cal.4th at p. 1107.)

The invocation of "the command of extrajudicial 'law' from any source other than the trial judge, no matter how well intentioned, is not permitted." (Jones v. Kemp, supra, 706 F.Supp. at p. 1559; accord, People v. Mincey, supra, 2 Cal.4th at p. 485 (conc. & dis. opn. of Mosk, J.); see People v. Wrest, supra, 3 Cal.4th at p. 1107.)

Indeed, the "use ... of an extrajudicial code ... cannot be reconciled with the Eighth Amendment's requirement that any decision to impose death ***201** must be the result of discretion which is carefully and narrowly channelled and circumscribed by the secular law of the jurisdiction." (Jones v. Kemp, supra, 706 F.Supp. at p. 1559; accord, People v. Mincey, supra, 2 Cal.4th at p. 485 (conc. & dis. opn. of Mosk, J.); see People v. Wrest, supra, 3 Cal.4th at p. 1107.)

The Bible, of course, is just such an extrajudicial code. (People v. Mincey, supra, 2 Cal.4th at p. 483 (conc. & dis. opn. of Mosk, J.); Jones v. Kemp, supra, 706 F.Supp. at p. 1559.) Its commands and prohibitions cannot be viewed as mere reliquiae of a culture separated from ours by thousands of miles and thousands of years. This is because "[t]o the average juror, ... the Bible is an authoritative religious document ...." (Jones v. Kemp, supra, at p. 1559; accord, People v. Mincey, supra, at pp. 483-484 (conc. & dis. opn. of Mosk, J.).)

It is also misconduct for a prosecutor to seek to "minimize the jury's sense of responsibility for determining the appropriateness of death." (Caldwell v. Mississippi (1985) 472 U.S. 320, 341 [86 L.Ed.2d 231, 247, 105 S.Ct. 2633]; accord, People v. Wrest, supra, 3 Cal.4th at p. 1107.) "[U]nder the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.' " (Caldwell v. Mississippi, supra, at p. 329 [86 L.Ed.2d at p. 239], quoting California v. Ramos (1983) 463 U.S. 992, 998-999 [77 L.Ed.2d 1171, 1178-1179, 103 S.Ct. 3446].) The assumption underlying Eighth Amendment jurisprudence is that "a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' " (Caldwell v. Mississippi, supra, at p. 341 [86 L.Ed.2d at p. 247].) This premise is threatened when a representative of the government attempts to undermine the jurors' proper attitude and approach.

It hardly needs mention that "[a] prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the State." (People v. Espinoza (1992) 3 Cal.4th 806, 820 [12 Cal.Rptr.2d 682, 838 P.2d 204].) [FN1]

> FN1 Because the issue is not raised in this case, I do not attempt to define "religious" misconduct by defense counsel. Certainly, the task would require some delicacy. For example, the provisions of the United States and California Constitutions that constrain the prosecution in this regard- including the clauses concerning establishment of religion (U.S. Const., Amend. I; Cal. Const., art. I, § 4), cruel and unusual punishments (U.S. Const., Amend. VIII; Cal. Const., art. I, § 17), and due process of law (U.S. Const., Amend. XIV; Cal. Const., art. I, § 15)- are

generally inapplicable to the defense. (But see Cal. Const., art. I, § 29 ["In a criminal case, the people of the State of California have the right to due process of law ...."].) I leave this labor to another day. The majority should do so as well. They purport to distinguish between permissible references to "religion" and impermissible references to "religious law." Their "rule" may be suitable for sophists to debate in rhetorical exercises. It is altogether too vague for the bench and bar to apply in criminal trials.

III

On the very face of the record, prosecutorial misconduct is manifest. *202

To begin with, the prosecutor invoked purported religious law in support of the imposition of the penalty of death. That is indisputable.

As noted, the prosecutor stated: "[Defense counsel] says don't play God. [']Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an avenger who brings wrath upon one who practices evil.['] [¶] You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right." The prosecutor returned to the point: "Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."

In a word, the "rule of decision" that the prosecutor urged the jury to apply was assertedly religious. He cited the Bible to the jurors. To be sure, he did not expressly identify the relevant passage-which is Romans 13:1-4-as biblical in source and in substance. No such identification was required. There is no reasonable likelihood that the jury understood the words to be anything other than what they were.

Further, the "purpose of punishment" that the prosecutor called on the jury to serve was assertedly religious as well. He exhorted the jurors to destroy defendant's corruptible body in order to save his immortal soul. [FN2] ***203**

> FN2 In accord with above analysis is Commonwealth v. Chambers (1991) 528 Pa. 558 [599 A.2d 630]. There, the Pennsylvania Supreme Court considered a claim of prosecutorial misconduct based on comments that "Karl Chambers has taken a life" and "As the Bible says, 'and the murderer shall be put to death.' " It found the point meritorious. Its reasoning was as follows.
> "In the past we have narrowly tolerated references to the Bible and have characterized such references as on the limits of 'oratorical flair' and have cautioned that such references are a dangerous practice which we strongly discourage. Commonwealth v. Henry, 524 Pa. 135, 569 A.2d 929 (1990); Commonwealth v. Whitney, 511 Pa. 232, 512 A.2d 1152 (1986). We now admonish all prosecutors that reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action.
> "Here, the prosecutor argued, 'As the Bible says, "and the murderer shall be put to death." ' This reference is substantially different than the references tolerated in Henry and Whitney where the prosecutor allegorically likened the Defendant to the Prince of Darkness mentioned

> in the Bible to establish that he was an evil person.
> "More than allegorical reference, this argument by the prosecutor advocates to the jury that an independent source of law exists for the conclusion that the death penalty is the appropriate punishment for [Chambers]. By arguing that the Bible dogmatically commands that 'the murderer shall be put to death,' the prosecutor interjected religious law as an additional factor for the jury's consideration which neither flows from the evidence or any legitimate inference to be drawn therefrom. We believe that such an argument is a deliberate attempt to destroy the objectivity and impartiality of the jury which cannot be cured and which we will not countenance. Our courts are not ecclesiastical courts and, therefore, there is no reason to refer to religious rules or commandments to support the imposition of a death penalty.
> "Our Legislature has enacted a Death Penalty Statute which carefully categorizes all the factors that a jury should consider in determining whether the death penalty is an appropriate punishment and, if a penalty of death is meted out by a jury, it must be because the jury was satisfied that the substantive law of the Commonwealth requires its imposition, not because of some other source of law." (Commonwealth v. Chambers, supra, 528 Pa. at pp. 586-587 [599 A.2d at p. 644].)

The majority rightly conclude that the prosecutor's impropriety cannot be justified or even excused as "fairly responsive" to comments in defense counsel's summation. True, the prosecutor asserted that he "want[ed] to respond to some of the things argued by [defense counsel]." But there was nothing "fairly responsive" about what he would soon say. Perhaps the matter would have been different if counsel had declared or even suggested that the death penalty was inappropriate under some religious law. He had not done so. Notwithstanding his utterance of the word "God" and his reference to lex talionis, his

argument was altogether secular-to the effect that the jurors each held an absolute power of life and death over defendant; that they should reject death as empty vengeance; and that they should choose life to vindicate what is good in human beings and human society.

More important, even a "fair response" of this kind by a prosecutor would be altogether impermissible. It is plain from the analysis set out above that the government is prohibited from interjecting religion into the sentencing process. The prosecutor is its representative. The bar that constrains the principal constrains the agent as well.

In addition, the prosecutor sought to minimize the jury's sense of responsibility for determining the appropriateness of death. That too is indisputable.

As noted, the prosecutor stated: "The defense wants to make [the penalty determination] burdensome for you. [']Each and everyone [sic] of you from here on must live with that decision. Push that button over there. You must live with that decision for the rest of your life.['] [¶] Well, if it wasn't you called upon to carry out the will of the people of the State of California, ***204** would have been another jury, because that's our system. That's how the law is affected in this state. [¶] Don't once think that you have to feel burdened and depressed because I voted for death. You are doing what the law says if it's substantial, the aggravation substantially outweighs the mitigation. Don't listen to this lawyer talk."

The prosecutor's impropriety in this regard cannot seriously be denied. Indeed, the majority's efforts here are totally nonexistent-and that in spite of the fact that defendant expressly raised the claim in his briefing before this court.

I now turn from the fact of the prosecutor's misconduct to its

consequence.

It is the general rule for error under California law that reversal requires prejudice (People v. Gordon (1990) 50 Cal.3d 1223, 1253 [270 Cal.Rptr. 451, 792 P.2d 251]) and prejudice in turn requires a reasonable possibility of an effect on the outcome when, as here, penalty in a capital trial is involved (People v. Brown (1988) 46 Cal.3d 432, 446-448 [250 Cal.Rptr. 604, 758 P.2d 1135]).

Similarly, it is the general rule for error under the United States Constitution that reversal requires prejudice and prejudice in turn is presumed unless the government shows that the failing was harmless beyond a reasonable doubt. (See, e.g., Rose v. Clark (1986) 478 U.S. 570, 576-579 [92 L.Ed.2d 460, 469-471, 106 S.Ct. 3101].)

The prosecutor's misconduct implicates both California law and the United States Constitution. It appears to be subject to the general rule of harmless- error analysis. Thus, insofar as state law is concerned, the "reasonable possibility" standard is applied. Insofar as the federal charter is involved, the "reasonable doubt" test is employed.

The prosecutor's misconduct went to the first, last, and only issue before the jury in the penalty phase of this capital trial, viz., whether they were to take or spare defendant's life. The evidence in aggravation was not insubstantial. But not insubstantial too was the evidence in mitigation.

The prosecutor's attempt to minimize the jury's responsibility cannot be deemed unsuccessful. "A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that

***205** issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion." (Caldwell v. Mississippi, supra, 472 U.S. at p. 333 [86 L.Ed.2d at p. 242].) Comments like those of the prosecutor in this case offered the jurors an easy way to avoid a hard choice-in fact, an especially hard choice, to judge from the relatively close balance of aggravation and mitigation at the penalty phase and the labored progress of the deliberations thereafter.

Perhaps more significant, the prosecutor's argument from purported religious law must have carried special force, incorporating as it did "what many consider an authoritative source-if not Authority Itself." (People v. Mincey, supra, 2 Cal.4th at p. 487 (conc. & dis. opn. of Mosk, J.).)

I acknowledge that the jury did not return its verdict of death immediately after the prosecutor's misconduct and that it also returned three verdicts of life. "That fact means only that [the] impropriety did not instantly [and totally] determine the outcome. It simply does not suggest that it was without improper influence." (People v. Mincey, supra, 2 Cal.4th at p. 487 (conc. & dis. opn. of Mosk, J.).) The majority appear to assume that the force of the impropriety was dissipated in the course of deliberations. A contrary assumption, however, seems more reasonable on this record: the impropriety's force actually determined the course of deliberations and thereby prevented four early verdicts of life. [FN3]

> FN3 In accord on this point as well is Commonwealth v. Chambers, supra, 528 Pa. 558 [599 A.2d 630]. As noted, the Pennsylvania Supreme Court in that case held meritorious a claim of prosecutorial misconduct based on the comments that "Karl Chambers has taken a life" and "As the Bible says, 'and the murderer shall be put to death.' " (See fn. 2, ante.) "Because the prosecutor's argument in

> favor of the death penalty reached outside of the evidence of the case and the law of this Commonwealth," concluded the court, "we are not convinced that the penalty was not the product of passion, prejudice or an arbitrary factor and, therefore, pursuant to our Death Penalty Statute, we must vacate the sentence of death ...." (528 Pa. at p. 587 [599 A.2d at p. 644].)

In sum, the misconduct raises a reasonable possibility of an adverse effect on the outcome, and cannot be deemed harmless beyond a reasonable doubt.

IV

For the reasons stated above, I would set aside the sentence of death.

Appellant's petition for a rehearing was denied February 10, 1993, and the opinion was modified to read as printed above. Mosk, J., was of the opinion that the petition should be granted.

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Cal. 1992.

APPENDIX E

Supreme Court of the United States

Clarence VICTOR, Petitioner,
v.
NEBRASKA.
Alfred Arthur SANDOVAL, Petitioner,
v.
CALIFORNIA.

Nos. 92-8894, 92-9049.

Argued Jan. 18, 1994.
Decided March 22, 1994.
Rehearing Denied May 16, 1994.
See 511 U.S. 1101, 114 S.Ct. 1872.

First defendant was convicted in the District Court, Douglas County, James A. Buckley, J., of first-degree murder, and he was sentenced to death. The Nebraska Supreme Court affirmed on direct appeal, 235 Neb. 770, 457 N.W.2d 431, and affirmed denial of postconviction relief, 242 Neb. 306, 494 N.W.2d 565. First defendant petitioned for writ of certiorari. Second defendant was convicted in the Superior Court, Los Angeles County, Richard P. Kalustian, J., of four counts of first-degree murder, and was sentenced to death. The California Supreme Court, 4 Cal.4th 155, 14 Cal.Rptr.2d 342, 841 P.2d 862, affirmed, and second defendant petitioned for writ of certiorari. The United States Supreme Court, Justice O'Connor, held that instructions defining "reasonable doubt" did not violate due process clause.

Affirmed.

Justice Kennedy filed concurring opinion.

Justice Ginsburg filed opinion concurring in part and concurring in the judgment.

Justice Blackmun filed opinion concurring in part and dissenting in part, which Justice Souter joined in part.

West Headnotes

[1] Criminal Law k328
110k328

[1] Criminal Law k561(1)
110k561(1)

Government must prove beyond a reasonable doubt every element of charged offense.

[2] Constitutional Law k266(7)
92k266(7)

[2] Criminal Law k789(1)
110k789(1)

[2] Criminal Law k789(2)
110k789(2)

"Beyond a reasonable doubt" standard is requirement of due process, but Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as matter of course; so long as trial court instructs jury on necessity that defendant's guilt be proven beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising jury of government's burden of proof. U.S.C.A. Const.Amends. 5, 14.

[3] Constitutional Law k268(11)

92k268(11)

[3] Criminal Law k789(2)
110k789(2)

When defendant challenges reasonable doubt instruction, constitutional question is whether there is reasonable likelihood that jury understood instruction to allow conviction based on proof insufficient to meet standard required under *Winship*. U.S.C.A. Const.Amends. 5, 14.

[4] Constitutional Law k268(11)
92k268(11)

[4] Criminal Law k789(2)
110k789(2)

Reference to "moral evidence" did not cause California instruction defining reasonable doubt to violate due process, considering that modern definition of "moral evidence" was consistent with its original meaning when it was first used to define reasonable doubt, that meaning of phrase was apparent from its use in instruction, and that other instructions given correctly pointed jurors' attention to facts in case before them, not ethics or morality of defendant's criminal acts. West's Ann.Cal.Penal Code § 1096; U.S.C.A. Const.Amend. 14.

[5] Constitutional Law k268(11)
92k268(11)

[5] Criminal Law k789(8)
110k789(8)

Reference to "moral certainty" did not cause California instruction defining reasonable doubt to violate due process, though use of phrase "moral certainty" could not be condoned

in light of changes in its common meaning since it was first used to define reasonable doubt, in that, when considered in context, phrase impressed upon jury need to reach subjective state of near certitude of guilt, and there was no reasonable likelihood that jury would have understood phrase to be disassociated from evidence in case. West's Ann.Cal.Penal Code § 1096; U.S.C.A. Const.Amend. 14.

[6] Constitutional Law k268(11)
92k268(11)

[6] Criminal Law k789(2)
110k789(2)

California jury instruction that reasonable doubt was "not a mere possible doubt" did not violate due process, as it was clear from another phrase of the sentence, which noted everything was open to some possible or imaginary doubt, that instruction used "possible" in sense of fanciful. West's Ann.Cal.Penal Code § 1096; U.S.C.A. Const.Amend. 14.

[7] Criminal Law k561(1)
110k561(1)

[7] Criminal Law k789(2)
110k789(2)

A fanciful doubt is not a reasonable doubt.

[8] Federal Courts k508
170Bk508

Constitutional challenge to Nebraska instruction defining reasonable doubt was properly presented for review of Supreme Court, despite defendant's failure to object to instruction at trial or to raise issue on direct appeal in state court, where last state

court in which review could be had considered constitutional claim on the merits.

[9] Constitutional Law k268(11)
92k268(11)

[9] Criminal Law k789(7)
110k789(7)

Equating reasonable doubt with "substantial doubt" did not cause Nebraska jury instruction defining reasonable doubt to violate due process, considering context in which "substantial doubt" was used, distinguishing actual and substantial doubt from doubt arising from mere possibility, from bare imagination, or from fanciful conjecture, and considering instruction's approved alternative definition of reasonable doubt as doubt that causes reasonable person to hesitate to act. U.S.C.A. Const.Amend. 14.

[10] Constitutional Law k268(11)
92k268(11)

[10] Criminal Law k789(8)
110k789(8)

Reference to "moral certainty" did not cause Nebraska instruction defining reasonable doubt to violate due process, considering that jurors were further instructed that they had to have abiding conviction of defendant's guilt, that instruction equated doubt sufficient to preclude moral certainty with doubt that would cause reasonable person to hesitate to act, and that jurors were instructed that they should be governed solely by evidence introduced before them, and should not indulge in speculation, conjectures, or inferences not supported by evidence. U.S.C.A. Const.Amend. 14.

[11] Constitutional Law k268(11)
92k268(11)

[11] Criminal Law k789(2)
110k789(2)

Reference to "strong probabilities" did not cause Nebraska instruction defining reasonable doubt to violate due process, considering that, in same sentence, instruction informed jury that probabilities had to be strong enough to prove defendant's guilt beyond a reasonable doubt. U.S.C.A. Const.Amend. 14.

[12] Constitutional Law k266(7)
92k266(7)

[12] Constitutional Law k268(11)
92k268(11)

Due process clause requires government to prove criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid defining reasonable doubt so as to lead jury to convict on lesser showing than due process requires. U.S.C.A. Const.Amends. 5, 14.

****1240** *Syllabus* [FN*]

> FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***1** The government must prove beyond a reasonable doubt every element of a charged offense. *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368. In upholding the first degree murder convictions and death sentences of petitioners Sandoval and Victor, the Supreme Courts of California and

Nebraska, respectively, rejected contentions that due process was violated by the pattern **1241 jury instructions defining "reasonable doubt" that were given in both cases.

Held: Taken as a whole, the instructions in question correctly conveyed the concept of reasonable doubt, and there is no reasonable likelihood that the jurors understood the instructions to allow convictions based on proof insufficient to meet the *Winship* standard. Pp. 1243-1251.

(a) The Constitution does not dictate that any particular form of words be used in advising the jury of the government's burden of proof, so long as "taken as a whole, the instructions correctly conve[y] the concept of reasonable doubt," *Holland v. United States,* 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150. In invalidating a charge declaring, among other things, that a reasonable doubt "must be such ... as would give rise to a grave uncertainty," "is an actual substantial doubt," and requires "a moral certainty," the Court, in *Cage v. Louisiana,* 498 U.S. 39, 40, 111 S.Ct. 328, 329, 112 L.Ed.2d 339, observed that *2 a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that which is constitutionally required. However, in *Estelle v. McGuire,* 502 U.S. 62, 72, and n. 4, 112 S.Ct. 475, 482 & n., 116 L.Ed.2d 385 the Court made clear that the proper inquiry is not whether the instruction "could have" been applied unconstitutionally, but whether there is a reasonable likelihood that the jury *did* so apply it. P. 1243.

(b) The instructions given in Sandoval's case defined reasonable doubt as, among other things, "not a mere possible doubt," but one "depending on moral evidence," such that the jurors could not say they felt an abiding conviction, "to a moral certainty," of the truth of the charge. Pp. 1243-1245.

(c) Sandoval's objection to the charge's use of the 19th century

phrases "moral evidence" and "moral certainty" is rejected. Although the former phrase is not a mainstay of the modern lexicon, its meaning today is consistent with its original meaning: evidence based on the general observation of people, rather than on what is demonstrable. Its use here is unproblematic because the instructions given correctly pointed the jurors' attention to the facts of the case before them, not (as Sandoval contends) the ethics or morality of his criminal acts. For example, in the instruction declaring that "everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt," moral evidence can only mean empirical evidence offered to prove matters relating to human affairs--the proof introduced at trial. Similarly, whereas "moral certainty," standing alone, might not be recognized by modern jurors as a synonym for "proof beyond a reasonable doubt," its use in conjunction with the abiding conviction language must be viewed as having impressed upon the jury the need to reach the subjective state of near certitude of guilt, see *Jackson v. Virginia,* 443 U.S. 307, 315, 99 S.Ct. 2781, 2786, 61 L.Ed.2d 560, and thus as not having invited conviction on less than the constitutionally required proof. Moreover, in contrast to the situation in *Cage,* there is no reasonable likelihood that the jury here would have understood moral certainty to be disassociated from the evidence in the case, since the instruction explicitly told the jurors, among other things, that their conclusion had to be based upon such evidence. Accordingly, although this Court does not condone the use of the antiquated "moral certainty" phrase, its use in the context of the instructions as a whole cannot be said to have rendered those instructions unconstitutional. Pp. 1245-1249.

(d) Sandoval's objection to the portion of the charge declaring that a reasonable doubt is "not a mere possible doubt" is also rejected. That the instruction properly uses "possible" in the sense of fanciful is made *3 clear by the fact that it also notes that everything "is open to some possible or imaginary doubt."

Pp. 1248-1249.

(e) The instructions given in Victor's case defined reasonable doubt as, among other things, a doubt that will not permit an abiding conviction, "to a moral certainty," of the accused's guilt, and an "actual and substantial doubt" that is not excluded by the **1242 "strong probabilities of the case." Pp. 1248- 1250.

(f) Victor's primary argument--that equating a reasonable doubt with a "substantial doubt" overstated the degree of doubt necessary for acquittal--is rejected. Any ambiguity is removed by reading the phrase in question in context: The Victor charge immediately distinguished an "actual and substantial doubt" from one "arising from mere possibility, from bare imagination, or from fanciful conjecture," and thereby informed the jury that a reasonable doubt is something more than a speculative one, which is an unexceptionable proposition. *Cage, supra,* 498 U.S., at 41, 111 S.Ct., at 329, distinguished. Moreover, the instruction defined a reasonable doubt alternatively as a doubt that would cause a reasonable person to hesitate to act, a formulation which this Court has repeatedly approved and which gives a commonsense benchmark for just how substantial a reasonable doubt must be. P. 1250.

(g) The inclusion of the "moral certainty" phrase in the Victor charge did not render the instruction unconstitutional. In contrast to the situation in *Cage,* a sufficient context to lend meaning to the phrase was provided by the rest of the Victor charge, which equated a doubt sufficient to preclude moral certainty with a doubt that would cause a reasonable person to hesitate to act, and told the jurors that they must have an abiding conviction of Victor's guilt, must be convinced of such guilt "after full, fair, and impartial consideration of all the evidence," should be governed solely by that evidence in determining factual issues, and should not indulge in speculation, conjectures, or unsupported inferences. Pp.

1250-1251.

(h) The reference to "strong probabilities" in the Victor charge does not unconstitutionally understate the government's burden, since the charge also informs the jury that the probabilities must be strong enough to prove guilt beyond a reasonable doubt. See *Dunbar v. United States,* 156 U.S. 185, 199, 15 S.Ct. 325, 330, 39 L.Ed. 390. P. 1251.

No. 92-8894, 242 Neb. 306, 494 N.W.2d 565, and No. 92-9049, 4 Cal.4th 155, 14 Cal.Rptr.2d 342, 841 P.2d 862 affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court with respect to Part II, and the opinion of the Court with respect to Parts I, III, and IV, in which REHNQUIST, C.J., and STEVENS, SCALIA, KENNEDY, and *4 THOMAS, JJ., joined in full, and in which GINSBURG, J., joined as to Parts III-B and IV. KENNEDY, J., filed a concurring opinion, *post,* p. 1251. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 1252. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in all but Part II of which SOUTER, J., joined, *post,* p. 1254.

Mark A. Weber, Omaha, NE, argued for petitioner Clarence Victor.

Eric S. Multhaup, San Francisco, CA, argued for petitioner Alfred Arthur Sandoval.

Donald B. Stenberg, Lincoln, NE, argued for respondent Nebraska.

Daniel E. Lungren, Atty. Gen. of California, argued for respondent California.

5 Justice O'CONNOR delivered the opinion of the Court. [FN]

FN* Justices BLACKMUN and SOUTER join only Part II of this opinion. Justice GINSBURG joins only Parts II, III-B, and IV.

[1] The government must prove beyond a reasonable doubt every element of a charged offense. *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Although this standard is an ancient and honored aspect of our criminal justice system, it defies easy explication. In these cases, we consider the constitutionality of two attempts to define "reasonable doubt."

**1243 I

[2] The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Cf. *Hopt v. Utah,* 120 U.S. 430, 440-441, 7 S.Ct. 614, 618-20, 30 L.Ed. 708 (1887). Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, see *Jackson v. Virginia,* 443 U.S. 307, 320, n. 14, 99 S.Ct. 2781, 2789, n. 14, 61 L.Ed.2d 560 (1979), the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Cf. *Taylor v. Kentucky,* 436 U.S. 478, 485-486, 98 S.Ct. 1930, 1934-1935, 56 L.Ed.2d 468 (1978). Rather, "taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." *Holland v. United States,* 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954).

In only one case have we held that a definition of reasonable doubt violated the Due Process Clause. *Cage v. Louisiana,* 498

U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) (*per curiam*). There, the jurors were told:

> " '[A reasonable doubt] is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty,* raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible ***6** doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty.*' " *Id.,* at 40, 111 S.Ct., at 329 (emphasis added by this Court in *Cage*).

We held that the highlighted portions of the instruction rendered it unconstitutional:

> "It is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.,* at 41, 111 S.Ct., at 329.

[3] In a subsequent case, we made clear that the proper inquiry is not whether the instruction "could have" been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it. *Estelle v. McGuire,* 502 U.S. 62, 72, and n. 4, 112 S.Ct. 475, 482 & n. 4, 116 L.Ed.2d 385 (1991). The constitutional question in the present cases, therefore, is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard. Although

other courts have held that instructions similar to those given at petitioners' trials violate the Due Process Clause, see *State v. Bryant,* 334 N.C. 333, 432 S.E.2d 291 (1993), cert. pending, No. 93-753; *Morley v. Stenberg,* 828 F.Supp. 1413 (Neb.1993), both the Nebraska and the California Supreme Courts held that the instructions were constitutional. We granted certiorari, 509 U.S. 954, 114 S.Ct. 39, 125 L.Ed.2d 788 (1993), and now affirm both judgments.

*7 II

On October 14, 1984, petitioner Sandoval shot three men, two of them fatally, in a gang-related incident in Los Angeles. About two weeks later, he entered the home of a man who had given information to the police about the murders and shot him dead; Sandoval then killed the man's wife because she had seen him murder her husband. Sandoval was convicted on four counts of first degree murder. The jury found that Sandoval personally used a firearm in the commission of each offense, and found the special circumstance of multiple murder. Cal.Penal **1244 Code Ann. § 12022.5 (West 1992) and Cal.Penal Code Ann. § 190.2(a)(3) (West 1988). He was sentenced to death for murdering the woman and to life in prison without possibility of parole for the other three murders. The California Supreme Court affirmed the convictions and sentences. 4 Cal.4th 155, 14 Cal.Rptr.2d 342, 841 P.2d 862 (1992).

The jury in Sandoval's case was given the following instruction on the government's burden of proof:

> "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt.

> "Reasonable doubt is defined as follows: It is *not a mere possible doubt;* because everything relating to human affairs, and *depending on moral evidence,* is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty,* of the truth of the charge." App. in No. 92-9049, p. 49 (emphasis added) (Sandoval App.).

***8** The California Supreme Court rejected Sandoval's claim that the instruction, particularly the highlighted passages, violated the Due Process Clause. 4 Cal.4th, at 185-186, 14 Cal.Rptr.2d, at 357, 841 P.2d, at 878.

The instruction given in Sandoval's case has its genesis in a charge given by Chief Justice Shaw of the Massachusetts Supreme Judicial Court more than a century ago:

> "[W]hat is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely

> to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt." *Commonwealth v. Webster,* 59 Mass. 295, 320 (1850).

The *Webster* charge is representative of the time when "American courts began applying [the beyond a reasonable doubt standard] in its modern form in criminal cases." *Apodaca* ***9** *v. Oregon,* 406 U.S. 404, 412, n. 6, 92 S.Ct. 1628, 1633, n. 6, 32 L.Ed.2d 184 (1972) (plurality opinion). See also *Perovich v. United States,* 205 U.S. 86, 92, 27 S.Ct. 456, 458, 51 L.Ed. 722 (1907) (approving *Webster* charge). In *People v. Strong,* 30 Cal. 151, 155 (1866), the California Supreme Court characterized the *Webster* instruction as "probably the most satisfactory definition ever given to the words 'reasonable doubt' in any case known to criminal jurisprudence." In *People v. Paulsell,* 115 Cal. 6, 12, 46 P. 734 (1896), the court cautioned state trial judges against departing from that formulation. And in 1927, the state legislature adopted the bulk of the *Webster* instruction as a statutory definition of reasonable doubt. Cal.Penal Code Ann. § 1096 (West 1985); see California Jury Instructions, Criminal, ****1245** No. 2.90 (4th ed. 1979). Indeed, the California Legislature has directed that "the court may read to the jury section 1096 of this code, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given." § 1096a. The statutory instruction was given in Sandoval's case.

The California instruction was criticized in *People v. Brigham,* 25 Cal.3d 283, 292-316, 157 Cal.Rptr. 905, 911-926, 599 P.2d 100, 106-121 (1979) (Mosk, J., concurring). Justice Mosk apparently did not think the instruction was unconstitutional, but he "urge[d] the Legislature to reconsider its codification."

Id., at 293, 157 Cal.Rptr., at 911, 599 P.2d, at 106. The California Assembly and Senate responded by requesting the committee on jury instructions of the Los Angeles Superior Court "to study alternatives to the definition of 'reasonable doubt' set forth in Section 1096 of the Penal Code, and to report its findings and recommendations to the Legislature." Cal.Assem.Con.Res. No. 148, 1986 Cal.Stats. 5634. The committee recommended that the legislature retain the statutory definition unmodified, see Alternative Definitions of Reasonable Doubt: A Report of the Committee on Standard Jury Instructions--Criminal to the California Legislature (May 22, 1987), and § 1096 has not been changed.

***10** A

[4][5] Sandoval's primary objection is to the use of the phrases "moral evidence" and "moral certainty" in the instruction. As noted, this part of the charge was lifted verbatim from Chief Justice Shaw's *Webster* decision; some understanding of the historical context in which that instruction was written is accordingly helpful in evaluating its continuing validity.

By the beginning of the Republic, lawyers had borrowed the concept of "moral evidence" from the philosophers and historians of the 17th and 18th centuries. See generally B. Shapiro, "Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence, ch. 1 (1991). James Wilson, who was instrumental in framing the Constitution and who served as one of the original Members of this Court, explained in a 1790 lecture on law that "evidence ... is divided into two species--demonstrative and moral." 1 Works of James Wilson 518 (J. Andrews ed. 1896). Wilson went on to explain the distinction thus:

> "Demonstrative evidence has for its subject abstract and necessary truths, or the unchangeable relations of ideas. Moral evidence has for its subject the real but contingent

truths and connections, which take place among things actually existing....

. . . . .

"In moral evidence, there not only may be, but there generally is, contrariety of proofs: in demonstrative evidence, no such contrariety can take place.... [T]o suppose that two contrary demonstrations can exist, is to suppose that the same proposition is both true and false: which is manifestly absurd. With regard to moral evidence, there is, for the most part, real evidence on both sides. On both sides, contrary presumptions, contrary ***11** testimonies, contrary experiences must be balanced." *Id.*, at 518- 519.

A leading 19th century treatise observed that "[m]atters of fact are proved by *moral evidence* alone; ... [i]n the ordinary affairs of life, we do not require demonstrative evidence, ... and to insist upon it would be unreasonable and absurd." 1 S. Greenleaf, Law of Evidence 3-4 (13th ed. 1876).

The phrase "moral certainty" shares an epistemological pedigree with moral evidence. See generally Shapiro, "To A Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850, 38 Hastings L.J. 153 (1986). Moral certainty was the highest degree of certitude based on such evidence. In his 1790 lecture, James Wilson observed:

"In a series of moral evidence, the inference drawn in the several steps is not ****1246** necessary; nor is it impossible that the premises should be true, while the conclusion drawn from them is false.

"... In moral evidence, we rise, by an insensible gradation, from possibility to probability, and from probability to the highest degree of moral certainty." 1 Works of James Wilson, *supra,* at 519.

At least one early treatise explicitly equated moral certainty with proof beyond a reasonable doubt:

> "Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact....
>
> "Even the most direct evidence can produce nothing more than such a high degree of probability as amounts to moral certainty. From the highest degree it may decline, by an infinite number of gradations, until it produce in the mind nothing more than a mere preponderance of assent in favour of the particular fact." T. Starkie, Law of Evidence 478 (2d ed. 1833).

***12** See also Greenleaf, *supra,* at 4 ("The most that can be affirmed of [things proved by moral evidence] is, that there is no reasonable doubt concerning them").

Thus, when Chief Justice Shaw penned the *Webster* instruction in 1850, moral certainty meant a state of subjective certitude about some event or occurrence. As the Massachusetts Supreme Judicial Court subsequently explained:

> "Proof 'beyond a reasonable doubt' ... is proof 'to a moral certainty,' as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent; each has been used by eminent judges to explain the other; and each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible." *Commonwealth v. Costley,* 118 Mass. 1, 24 (1875).

Indeed, we have said that "[p]roof to a 'moral certainty' is an equivalent phrase with 'beyond a reasonable doubt.' " *Fidelity Mut. Life Assn. v. Mettler,* 185 U.S. 308, 317, 22 S.Ct. 662, 665,

46 L.Ed. 922 (1902), citing *Commonwealth v. Costley, supra.* See also *Wilson v. United States,* 232 U.S. 563, 570, 34 S.Ct. 347, 349, 58 L.Ed. 728 (1914) (approving reasonable doubt instruction cast in terms of moral certainty); *Miles v. United States,* 103 U.S. 304, 309, 312, 26 L.Ed. 481 (1881).

We recognize that the phrase "moral evidence" is not a mainstay of the modern lexicon, though we do not think it means anything different today than it did in the 19th century. The few contemporary dictionaries that define moral evidence do so consistently with its original meaning. See, *e.g.,* Webster's New Twentieth Century Dictionary 1168 (2d ed. 1979) ("based on general observation of people, etc. rather than on what is demonstrable"); Collins English Dictionary ***13** 1014 (3d ed. 1991) (similar); 9 Oxford English Dictionary 1070 (2d ed. 1989) (similar).

Moreover, the instruction itself gives a definition of the phrase. The jury was told that "everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt"--in other words, that absolute certainty is unattainable in matters relating to human affairs. Moral evidence, in this sentence, can only mean empirical evidence offered to prove such matters--the proof introduced at trial.

This conclusion is reinforced by other instructions given in Sandoval's case. The judge informed the jurors that their duty was "to determine the facts of the case from the evidence received in the trial and not from any other source." Sandoval App. 38. The judge continued: "Evidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact." *Id.,* at 40. The judge also told the jurors that "you must not be influenced by pity for a defendant or by prejudice against him," and that "[y]ou must ****1247** not be swayed by mere sentiment, conjecture, sympathy, passion,

prejudice, public opinion or public feeling." *Id.*, at 39. These instructions correctly pointed the jurors' attention to the facts of the case before them, not (as Sandoval contends) the ethics or morality of Sandoval's criminal acts. Accordingly, we find the reference to moral evidence unproblematic.

We are somewhat more concerned with Sandoval's argument that the phrase "moral certainty" has lost its historical meaning, and that a modern jury would understand it to allow conviction on proof that does not meet the beyond a reasonable doubt standard. Words and phrases can change meaning over time: A passage generally understood in 1850 may be incomprehensible or confusing to a modern juror. And although some contemporary dictionaries contain definitions of moral certainty similar to the 19th century understanding ***14** of the phrase, see Webster's Third New International Dictionary 1468 (1981) ("virtual rather than actual, immediate, or completely demonstrable"); 9 Oxford English Dictionary, *supra,* at 1070 ("a degree of probability so great as to admit of no reasonable doubt"), we are willing to accept Sandoval's premise that "moral certainty," standing alone, might not be recognized by modern jurors as a synonym for "proof beyond a reasonable doubt." But it does not necessarily follow that the California instruction is unconstitutional.

Sandoval first argues that moral certainty would be understood by modern jurors to mean a standard of proof lower than beyond a reasonable doubt. In support of this proposition, Sandoval points to contemporary dictionaries that define moral certainty in terms of probability. *E.g.,* Webster's New Twentieth Century Dictionary, *supra,* at 1168 ("based on strong probability"); Random House Dictionary of the English Language 1249 (2d ed. 1983) ("resting upon convincing grounds of probability"). But the beyond a reasonable doubt standard is itself probabilistic. "[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event,

the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened." *In re Winship,* 397 U.S., at 370, 90 S.Ct., at 1075 (Harlan, J., concurring) (emphasis in original). The problem is not that moral certainty may be understood in terms of probability, but that a jury might understand the phrase to mean something less than the very high level of probability required by the Constitution in criminal cases.

Although in this respect moral certainty is ambiguous in the abstract, the rest of the instruction given in Sandoval's case lends content to the phrase. The jurors were told that they must have "an abiding conviction, to a moral certainty, of the truth of the charge." Sandoval App. 49. An instruction cast in terms of an abiding conviction as to guilt, without ***15** reference to moral certainty, correctly states the government's burden of proof. *Hopt v. Utah,* 120 U.S., at 439, 7 S.Ct., at 618 ("The word 'abiding' here has the signification of settled and fixed, a conviction which may follow a careful examination and comparison of the whole evidence"); see Criminal Jury Instructions: District of Columbia 46 (3d H. Greene & T. Guidoboni ed. 1978). And the judge had already informed the jury that matters relating to human affairs are proved by moral evidence, see *supra,* at 1246; giving the same meaning to the word moral in this part of the instruction, moral certainty can only mean certainty with respect to human affairs. As used in this instruction, therefore, we are satisfied that the reference to moral certainty, in conjunction with the abiding conviction language, "impress[ed] upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused." *Jackson v. Virginia,* 443 U.S., at 315, 99 S.Ct., at 2786. Accordingly, we reject Sandoval's contention that the moral certainty element of the California instruction invited the jury to convict him on proof below that required by the Due Process Clause.

Sandoval's second argument is a variant of the first. Accepting that the instruction requires a high level of confidence in the defendant's**1248 guilt, Sandoval argues that a juror might be convinced to a moral certainty that the defendant is guilty even though the government has failed to *prove* his guilt beyond a reasonable doubt. A definition of moral certainty in a widely used modern dictionary lends support to this argument, see American Heritage Dictionary 1173 (3d ed. 1992) ("Based on strong likelihood or firm conviction, rather than on the actual evidence"), and we do not gainsay its force. As we have noted, "[t]he constitutional standard recognized in the *Winship* case was expressly phrased as one that protects an accused against a conviction except on '*proof* beyond a reasonable doubt.' " *Jackson v. Virginia, supra,* at 315, 99 S.Ct., at 2786 (emphasis in original). Indeed, in *Cage* we contrasted ***16** "moral certainty" with "evidentiary certainty." 498 U.S., at 41, 111 S.Ct., at 330.

But the moral certainty language cannot be sequestered from its surroundings. In the *Cage* instruction, the jurors were simply told that they had to be morally certain of the defendant's guilt; there was nothing else in the instruction to lend meaning to the phrase. Not so here. The jury in Sandoval's case was told that a reasonable doubt is "that state of the case which, *after the entire comparison and consideration of all the evidence,* leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." Sandoval App. 49 (emphasis added). The instruction thus explicitly told the jurors that their conclusion had to be based on the evidence in the case. Other instructions reinforced this message. The jury was told "to determine the facts of the case from the evidence received in the trial and not from any other source." *Id.,* at 38. The judge continued that "you must not be influenced by pity for a defendant or by prejudice against him.... You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public

opinion or public feeling." *Id.*, at 39. Accordingly, there is no reasonable likelihood that the jury would have understood moral certainty to be disassociated from the evidence in the case.

We do not think it reasonably likely that the jury understood the words "moral certainty" either as suggesting a standard of proof lower than due process requires or as allowing conviction on factors other than the government's proof. At the same time, however, we do not condone the use of the phrase. As modern dictionary definitions of moral certainty attest, the common meaning of the phrase has changed since it was used in the *Webster* instruction, and it may continue to do so to the point that it conflicts with the *Winship* standard. Indeed, the definitions of reasonable doubt most widely used in the federal courts do not contain ***17** any reference to moral certainty. See Federal Judicial Center, Pattern Criminal Jury Instructions 28 (1988); 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 11.14 (3d ed. 1977). But we have no supervisory power over the state courts, and in the context of the instructions as a whole we cannot say that the use of the phrase rendered the instruction given in Sandoval's case unconstitutional.

B

[6][7] Finally, Sandoval objects to the portion of the charge in which the judge instructed the jury that a reasonable doubt is "not a mere possible doubt." The *Cage* instruction included an almost identical reference to "not a mere possible doubt," but we did not intimate that there was anything wrong with that part of the charge. See 498 U.S., at 40, 111 S.Ct., at 329. That is because "[a] 'reasonable doubt,' at a minimum, is one based upon 'reason.' " *Jackson v. Virginia, supra,* 443 U.S., at 317, 99 S.Ct., at 2787. A fanciful doubt is not a reasonable doubt. As Sandoval's defense attorney told the jury: "Anything can be

possible.... [A] planet could be made out of blue cheese. But that's really not in the realm of what we're talking about." Sandoval App. 79 (excerpt from closing argument). That this is the sense in which the instruction uses "possible" is made clear from the final phrase of **1249 the sentence, which notes that everything "is open to some possible or imaginary doubt." We therefore reject Sandoval's challenge to this portion of the instruction as well.

III

On December 26, 1987, petitioner Victor went to the Omaha home of an 82-year-old woman for whom he occasionally did gardening work. Once inside, he beat her with a pipe and cut her throat with a knife, killing her. Victor was convicted of first degree murder. A three-judge panel found the statutory aggravating circumstances that Victor had previously been convicted of murder, Neb.Rev.Stat. § 29-2523(1)(a) (1989), and that the murder in this case was especially *18 heinous, atrocious, and cruel, § 29-2523(1)(d). Finding none of the statutory mitigating circumstances, the panel sentenced Victor to death. The Nebraska Supreme Court affirmed the conviction and sentence. *State v. Victor,* 235 Neb. 770, 457 N.W.2d 431 (1990), cert. denied, 498 U.S. 1127, 111 S.Ct. 1091, 112 L.Ed.2d 1195 (1991).

[8] At Victor's trial, the judge instructed the jury that "[t]he burden is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden never shifts." App. in No. 92- 8894, p. 8 (Victor App.). The charge continued:

> " 'Reasonable doubt' is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you,

> after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, *to a moral certainty,* of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the *strong probabilities of the case,* provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an *actual and substantial doubt* reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture." *Id.,* at 11 (emphasis added).

On state postconviction review, the Nebraska Supreme Court rejected Victor's contention that the instruction, particularly ***19** the emphasized phrases, violated the Due Process Clause. 242 Neb. 306, 310-311, 494 N.W.2d 565, 569 (1993). Because the last state court in which review could be had considered Victor's constitutional claim on the merits, it is properly presented for our review despite Victor's failure to object to the instruction at trial or raise the issue on direct appeal. See, *e.g., Ylst v. Nunnemaker,* 501 U.S. 797, 801, 111 S.Ct. 2590, 2593-2594, 115 L.Ed.2d 706 (1991).

The instruction given in Victor's case can be traced to two separate lines of cases. Much of the charge is taken from Chief Justice Shaw's *Webster* instruction. See *Carr v. State,* 23 Neb. 749, 752-753, 37 N.W. 630, 631-632 (1888) (approving the use of *Webster*). The rest derives from a series of decisions approving instructions cast in terms of an "actual doubt" that would cause a reasonable person to hesitate to act. See, *e.g., Whitney v. State,* 53 Neb. 287, 298, 73 N.W. 696, 699 (1898);

Willis v. State, 43 Neb. 102, 110-111, 61 N.W. 254, 256 (1894); *Polin v. State,* 14 Neb. 540, 546- 547, 16 N.W. 898, 900-901 (1883). In 1968, a committee appointed by the Nebraska Supreme Court developed model jury instructions; a court rule in effect at the time Victor was tried directed that those instructions were to be used where applicable. Nebraska Jury Instructions IX (1969) (N.J.I.). The model instruction on reasonable doubt, N.J.I. 14.08, is the one given at Victor's trial. (Since Victor was tried, a revised reasonable doubt instruction, ****1250** N.J.I.2d Crim. 2.0 (1992), has been adopted, although the prior version may still be used.)

A

[9] Victor's primary argument is that equating a reasonable doubt with a "substantial doubt" overstated the degree of doubt necessary for acquittal. We agree that this construction is somewhat problematic. On the one hand, "substantial" means "not seeming or imaginary"; on the other, it means "that specified to a large degree." Webster's Third New International Dictionary, at 2280. The former is unexceptionable, ***20** as it informs the jury only that a reasonable doubt is something more than a speculative one; but the latter could imply a doubt greater than required for acquittal under *Winship.* Any ambiguity, however, is removed by reading the phrase in the context of the sentence in which it appears: "A reasonable doubt is an actual and substantial doubt ... *as distinguished from* a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture." Victor App. 11 (emphasis added).

This explicit distinction between a substantial doubt and a fanciful conjecture was not present in the *Cage* instruction. We did say in that case that "the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." 498 U.S., at 41, 111 S.Ct., at 329. But we did not

hold that the reference to substantial doubt alone was sufficient to render the instruction unconstitutional. Cf. *Taylor v. Kentucky,* 436 U.S., at 488, 98 S.Ct., at 1936 (defining reasonable doubt as a substantial doubt, "though perhaps *not in itself reversible error,* often has been criticized as confusing") (emphasis added). Rather, we were concerned that the jury would interpret the term "substantial doubt" in parallel with the preceding reference to "grave uncertainty," leading to an overstatement of the doubt necessary to acquit. In the instruction given in Victor's case, the context makes clear that "substantial" is used in the sense of existence rather than magnitude of the doubt, so the same concern is not present.

In any event, the instruction provided an alternative definition of reasonable doubt: a doubt that would cause a reasonable person to hesitate to act. This is a formulation we have repeatedly approved, *Holland v. United States,* 348 U.S., at 140, 75 S.Ct., at 137; cf. *Hopt v. Utah,* 120 U.S., at 439-441, 7 S.Ct., at 618-620, and to the extent the word "substantial" denotes the quantum of doubt necessary for acquittal, the hesitate to act standard gives a common sense benchmark for just how substantial ***21** such a doubt must be. We therefore do not think it reasonably likely that the jury would have interpreted this instruction to indicate that the doubt must be anything other than a reasonable one.

B

[10] Victor also challenges the "moral certainty" portion of the instruction. In another case involving an identical instruction, the Nebraska Supreme Court distinguished *Cage* as follows: "[U]nder the *Cage* instruction a juror is to vote for conviction unless convinced to a moral certainty that there exists a reasonable doubt, whereas under the questioned instruction a juror is to vote for acquittal unless convinced to a moral certainty that no reasonable doubt exists." *State v. Morley,* 239

Neb. 141, 155, 474 N.W.2d 660, 670 (1991); see also 242 Neb., at 310-311, 494 N.W.2d, at 569 (relying on *Morley*). We disagree with this reading of *Cage.* The moral certainty to which the *Cage* instruction referred was clearly related to the defendant's guilt; the problem in *Cage* was that the rest of the instruction provided insufficient context to lend meaning to the phrase. But the Nebraska instruction is not similarly deficient.

Instructing the jurors that they must have an abiding conviction of the defendant's guilt does much to alleviate any concerns that the phrase "moral certainty" might be misunderstood in the abstract. See *supra,* at 1247. The instruction also equated a doubt sufficient to preclude moral certainty with a ****1251** doubt that would cause a reasonable person to hesitate to act. In other words, a juror morally certain of a fact would not hesitate to rely on it; and such a fact can fairly be said to have been proved beyond a reasonable doubt. Cf. *Hopt v. Utah, supra,* 120 U.S., at 439-440, 7 S.Ct., at 618-619. The jurors were told that they must be convinced of Victor's guilt "after full, fair, and impartial consideration of all the evidence." Victor App. 11. The judge also told them: "In determining any questions of fact presented in this case, you should be governed solely by the evidence introduced before you. You should not indulge ***22** in speculation, conjectures, or inferences not supported by the evidence." *Id.,* at 2. There is accordingly no reasonable likelihood that the jurors understood the reference to moral certainty to allow conviction on a standard insufficient to satisfy *Winship,* or to allow conviction on factors other than the government's proof. Though we reiterate that we do not countenance its use, the inclusion of the "moral certainty" phrase did not render the instruction given in Victor's case unconstitutional.

C

[11] Finally, Victor argues that the reference to "strong

probabilities" in the instruction unconstitutionally understated the government's burden. But in the same sentence, the instruction informs the jury that the probabilities must be strong enough to prove the defendant's guilt beyond a reasonable doubt. We upheld a nearly identical instruction in *Dunbar v. United States,* 156 U.S. 185, 199, 15 S.Ct. 325, 330, 39 L.Ed. 390 (1895): "While it is true that [the challenged instruction] used the words 'probabilities' and 'strong probabilities,' yet it emphasized the fact that those probabilities must be so strong as to exclude any reasonable doubt, and that is unquestionably the law" (citing *Hopt v. Utah, supra,* 120 U.S., at 439, 7 S.Ct., at 618). That conclusion has lost no force in the course of a century, and we therefore consider *Dunbar* controlling on this point.

IV

[12] The Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires. In these cases, however, we conclude that "taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury." *Holland v. United States, supra,* 348 U.S., at 140, 75 S.Ct., at 137. There is no reasonable likelihood that the jurors who determined petitioners' guilt applied the instructions ***23** in a way that violated the Constitution. The judgments in both cases are accordingly

Affirmed.

Justice KENNEDY, concurring.

It was commendable for Chief Justice Shaw to pen an instruction that survived more than a century, but, as the Court makes clear, what once might have made sense to jurors has

long since become archaic. In fact, some of the phrases here in question confuse far more than they clarify.

Though the reference to "moral certainty" is not much better, California's use of "moral evidence" is the most troubling, and to me seems quite indefensible. The derivation of the phrase is explained in the Court's opinion, but even with this help the term is a puzzle. And for jurors who have not had the benefit of the Court's research, the words will do nothing but baffle.

I agree that use of "moral evidence" in the California formulation is not fatal to the instruction here. I cannot understand, however, why such an unruly term should be used at all when jurors are asked to perform a task that can be of great difficulty even when instructions are altogether clear. The inclusion of words so malleable, because so obscure, might in other circumstances have put the whole instruction at risk.

With this observation, I concur in full in the opinion of the Court.

**1252 Justice GINSBURG, concurring in part and concurring in the judgment.

I agree with the Court that the reasonable doubt instructions given in these cases, read as a whole, satisfy the Constitution's due process requirement. As the Court observes, the instructions adequately conveyed to the jurors that they should focus exclusively upon the evidence, see *ante,* at 1246, 1248, 1250-1251, and that they should convict only if they had an *24 "abiding conviction" of the defendant's guilt, see *ante,* at 1247, 1250. I agree, further, with the Court's suggestion that the term "moral certainty," while not in itself so misleading as to render the instructions unconstitutional, should be avoided as an unhelpful way of explaining what reasonable doubt means. See *ante,* at 1248, 1251.

Similarly unhelpful, in my view, are two other features of the instruction given in Victor's case. That instruction begins by defining reasonable doubt as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon." App. in No. 92-8894, p. 11. A committee of distinguished federal judges, reporting to the Judicial Conference of the United States, has criticized this "hesitate to act" formulation

> "because the analogy it uses seems misplaced. In the decisions people make in the most important of their own affairs, resolution of conflicts about past events does not usually play a major role. Indeed, decisions we make in the most important affairs of our lives--choosing a spouse, a job, a place to live, and the like--generally involve a very heavy element of uncertainty and risk- taking. They are wholly unlike the decisions jurors ought to make in criminal cases." Federal Judicial Center, Pattern Criminal Jury Instructions 18-19 (1987) (commentary on instruction 21).

More recently, Second Circuit Chief Judge Jon O. Newman observed:

> "Although, as a district judge, I dutifully repeated [the 'hesitate to act' standard] to juries in scores of criminal trials, I was always bemused by its ambiguity. If the jurors encounter a doubt that would cause them to 'hesitate to act in a matter of importance,' what are they to do then? Should they decline to convict because they ***25** have reached a point of hesitation, or should they simply hesitate, then ask themselves whether, in their own private matters, they would resolve the doubt in favor of action, and, if so, continue on to convict?" Beyond "Reasonable Doubt," 68 N.Y.U.L.Rev. 201, 204 (1994) (James Madison Lecture, delivered at New York University Law

School, Nov. 9, 1993).

Even less enlightening than the "hesitate to act" formulation is the passage of the *Victor* instruction counseling: "[The jury] may find an accused guilty upon the strong probabilities of the case, *provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable.*" App. in No. 92-8894, p. 11. If the italicized words save this part of the instruction from understating the prosecution's burden of proof, see *ante,* at 19, they do so with uninstructive circularity. Jury comprehension is scarcely advanced when a court "defines" reasonable doubt as "doubt ... that is reasonable."

These and similar difficulties have led some courts to question the efficacy of any reasonable doubt instruction. At least two of the Federal Courts of Appeals have admonished their District Judges not to attempt a definition. [FN*] This Court, too, has suggested on occasion that prevailing definitions of ****1253** "reasonable doubt" afford no real aid. See, *e.g., Holland v. United States,* 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954) (" '[a]ttempts to explain the term "reasonable doubt" do not usually result in making it any clearer to the minds of the jury' "), ***26** quoting *Miles v. United States,* 103 U.S. 304, 312, 26 L.Ed. 481 (1881); *Hopt v. Utah,* 120 U.S. 430, 440-441, 7 S.Ct. 614, 618-619, 30 L.Ed. 708 (1887) ("The rule may be, and often is, rendered obscure by attempts at definition, which serve to create doubts instead of removing them."). But we have never held that the concept of reasonable doubt is undefinable, or that trial courts should not, as a matter of course, provide a definition. Nor, contrary to the Court's suggestion, see *ante,* at 1243, have we ever held that the Constitution does not require trial courts to define reasonable doubt.

FN* See, *e.g., United States v. Adkins,* 937 F.2d 947, 950 (CA4 1991) ("This circuit has repeatedly warned against

> giving the jury definitions of reasonable doubt, because definitions tend to impermissibly lessen the burden of proof.... The only exception to our categorical disdain for definition is when the jury specifically requests it."); *United States v. Hall,* 854 F.2d 1036, 1039 (CA7 1988) (upholding District Court's refusal to provide definition, despite jury's request, because "at best, definitions of reasonable doubt are unhelpful to a jury.... An attempt to define reasonable doubt presents a risk without any real benefit.").

Because the trial judges in fact defined reasonable doubt in both jury charges we review, we need not decide whether the Constitution required them to do so. Whether or not the Constitution so requires, however, the argument for defining the concept is strong. While judges and lawyers are familiar with the reasonable doubt standard, the words "beyond a reasonable doubt" are not self- defining for jurors. Several studies of jury behavior have concluded that "jurors are often confused about the meaning of reasonable doubt" when that term is left undefined. See Note, Defining Reasonable Doubt, 90 Colum.L.Rev. 1716, 1723 (1990) (citing studies). Thus, even if definitions of reasonable doubt are necessarily imperfect, the alternative--refusing to define the concept at all--is not obviously preferable. Cf. Newman, *supra,* at 205-206 ("I find it rather unsettling that we are using a formulation that we believe will become less clear the more we explain it.").

Fortunately, the choice need not be one between two kinds of potential juror confusion--on one hand, the confusion that may be caused by leaving "reasonable doubt" undefined, and on the other, the confusion that might be induced by the anachronism of "moral certainty," the misplaced analogy of "hesitation to act," or the circularity of "doubt that is reasonable." The Federal Judicial Center has proposed a definition of reasonable doubt that is clear, straightforward, and accurate. That

instruction reads:

> ***27** "[T]he government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> "Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty." Federal Judicial Center, Pattern Criminal Jury Instructions, at 17-18 (instruction 21).

This instruction plainly informs the jurors that the prosecution must prove its case by more than a mere preponderance of the evidence, yet not necessarily to an absolute certainty. The "firmly convinced" standard for conviction, repeated for emphasis, is further enhanced by the juxtaposed prescription that the jury must acquit if there is a "real possibility" that the defendant is innocent. This model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly.

I recognize, however, that this Court has no supervisory powers over the state courts, see *ante,* at 1248, and that the test we properly apply in evaluating the constitutionality of a reasonable doubt instruction is not whether we find it exemplary; instead, we inquire only whether there is a

"reasonable **1254 likelihood that the jury understood the instructio[n] to allow conviction based on proof insufficient to meet" the reasonable *28 doubt standard. See *ante,* at 1243. On that understanding, I join Parts II, III-B, and IV of the Court's opinion and concur in its judgment.

Justice BLACKMUN, with whom Justice SOUTER joins in all but Part II, concurring in part and dissenting in part.

In *Cage v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), this Court, by a *per curiam* opinion, found a jury instruction defining reasonable doubt so obviously flawed that the resulting state-court judgment deserved summary reversal. The majority today purports to uphold and follow *Cage,* but plainly falters in its application of that case. There is no meaningful difference between the jury instruction delivered at Victor's trial and the jury instruction issued in *Cage,* save the fact that the jury instruction in Victor's case did not contain the two words "grave uncertainty." But the mere absence of these two words can be of no help to the State, since there is other language in the instruction that is equally offensive to due process. I therefore dissent from the Court's opinion and judgment in No. 92-8894, *Victor v. Nebraska.*

I

Our democracy rests in no small part on our faith in the ability of the criminal justice system to separate those who are guilty from those who are not. This is a faith which springs fundamentally from the requirement that unless guilt is established beyond all reasonable doubt, the accused shall go free. It was not until 1970, however, in *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 that the Court finally and explicitly held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable-doubt of every fact necessary to constitute the crime

with which he is charged." *Id.*, at 364, 90 S.Ct., at 1072. In *Winship*, the Court recounted the long history of the reasonable doubt standard, noting that it "dates at least from our early years as a Nation." ***29** *Id.*, at 361, 90 S.Ct., at 1070. The Court explained that any "society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is a reasonable doubt about his guilt." *Id.*, at 363-364, 90 S.Ct., at 1072-1073.

Despite the inherent appeal of the reasonable-doubt standard, it provides protection to the innocent only to the extent that the standard, in reality, is an enforceable rule of law. To be a meaningful safeguard, the reasonable- doubt standard must have a tangible meaning that is capable of being understood by those who are required to apply it. It must be stated accurately and with the precision owed to those whose liberty or life is at risk. Because of the extraordinarily high stakes in criminal trials, "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.*, at 364, 90 S.Ct., at 1072.

When reviewing a jury instruction that defines "reasonable doubt," it is necessary to consider the instruction as a whole and to give the words their common and ordinary meaning. *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 482, 116 L.Ed.2d 385 (1991). It is not sufficient for the jury instruction merely to be susceptible to an interpretation that is technically correct. The important question is whether there is a "reasonable likelihood" that the jury was misled or confused by the instruction, and therefore applied it in a way that violated the Constitution. *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990). Any jury instruction defining "reasonable doubt" that suggests an improperly high degree of doubt for acquittal or an improperly low degree of certainty for conviction offends due process. Either

misstatement of the reasonable-doubt standard is prejudicial to the defendant, as it "vitiates all the jury's findings," see *Sullivan v. Louisiana,* 508 U.S. 275, 281, 113 S.Ct. 2078, 2079, 124 L.Ed.2d 182 (1993) (emphasis deleted), ****1255** and removes the only constitutionally appropriate predicate for the jury's verdict.

***30 A**

In a Louisiana trial court, Tommy Cage was convicted of first-degree murder and sentenced to death. On appeal to the Supreme Court of Louisiana, he argued, among other things, that the reasonable-doubt instruction used in the guilt phase of his trial violated the Due Process Clause of the Fourteenth Amendment. See *State v. Cage,* 554 So.2d 39 (1989). The instruction in relevant part provided:

> "If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such a doubt as would give rise to a *grave uncertainty,* raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an *actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty.*" *Id.,* at 41. (Second emphasis added; first and third emphases in original).

The Louisiana Supreme Court affirmed Cage's conviction,

reasoning that, although some of the language "might overstate the requisite degree of uncertainty and confuse the jury," the charge as a whole was understandable to "reasonable persons of ordinary intelligence," and therefore constitutional. *Ibid.*

We granted certiorari and summarily reversed. *Cage v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). The Court noted that some of the language in the instruction was adequate, but ruled ***31** that the phrases "actual substantial doubt" and "grave uncertainty" suggested a "higher degree of doubt than is required for acquittal under the reasonable-doubt standard," and that those phrases taken together with the reference to "moral certainty," rather than "evidentiary certainty," rendered the instruction as a whole constitutionally defective. *Id.*, at 41, 111 S.Ct., at 329.

Clarence Victor, petitioner in No. 92-8894, also was convicted of first-degree murder and sentenced to death. The instruction in his case reads as follows: " 'Reasonable doubt' is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a *moral certainty,* of the guilt of the accused. At the same time absolute or mathematical certainty is not required. *You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities of the case,* provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an *actual and substantial doubt* reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or

from fanciful conjecture." App. in No. 92-8894, p. 11 (emphases added).

The majority's attempt to distinguish this instruction from the one employed in *Cage* is wholly unpersuasive. Both instructions equate "substantial doubt" with reasonable doubt, *32 and refer to "moral certainty" rather than "evidentiary certainty." And although Victor's instruction does not contain **1256 the phrase "grave uncertainty," the instruction contains language that has an equal potential to mislead, including the invitation to the jury to convict based on the "strong probabilities" of the case and the overt effort to dissuade jurors from acquitting when they are "fully aware that possibly they may be mistaken." Nonetheless, the majority argues that "substantial doubt" has a meaning in Victor's instruction different from that in Cage's instruction, and that the "moral certainty" language is sanitized by its context. The majority's approach seems to me to fail under its own logic.

B

First, the majority concedes, as it must, that equating reasonable doubt with substantial doubt is "somewhat problematic" since one of the common definitions of "substantial" is " 'that specified to a large degree.' " *Ante,* at 1250. But the majority insists that the jury did not likely interpret the word "substantial" in this manner because Victor's instruction, unlike Cage's instruction, used the phrase "substantial doubt" as a means of distinguishing reasonable doubt from mere conjecture. According to the majority, "[t]his explicit distinction between a substantial doubt and a fanciful conjecture was not present in the *Cage* instruction," and thus, read in context, the use of "substantial doubt" in Victor's instruction is less problematic. *Ante,* at 1250.

A casual reading of the *Cage* instruction reveals the majority's

false premise. The *Cage* instruction plainly states that a reasonable doubt is a doubt "founded upon a real tangible substantial basis and not upon mere caprice and conjecture." See 498 U.S., at 40, 111 S.Ct., at 329. The *Cage* instruction also used the "substantial doubt" language to distinguish a reasonable doubt from "a mere possible doubt." *Ibid.* (" 'A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt* ' "). Thus, the reason the Court condemned the ***33** "substantial doubt" language in *Cage* had nothing to do with the absence of appropriate contrasting language; rather, the Court condemned the language for precisely the reason it gave: "[T]he words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Id.*, at 41, 111 S.Ct., at 329-330. In short, the majority's speculation that the jury in Victor's case interpreted "substantial" to mean something other than "that specified to a large degree" simply because the word "substantial" is used at one point to distinguish mere conjecture is unfounded and is foreclosed by *Cage* itself.

The majority further attempts to minimize the obvious hazards of equating "substantial doubt" with reasonable doubt by suggesting that, in *Cage*, it was the combined use of "substantial doubt" and "grave uncertainty," "in parallel," that rendered the use of the phrase "substantial doubt" unconstitutional. *Ante*, at 1250. This claim does not withstand scrutiny. The Court in *Cage* explained that *both* "substantial doubt" and "grave uncertainty" overstated the degree of doubt necessary to acquit, and found that it was the use of those words in conjunction with the misleading phrase "moral certainty" that violated due process. The Court's exact words were:

> "It is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then

> considered with the reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." 498 U.S., at 41, 111 S.Ct., at 329- 330.

Clearly, the Court was not preoccupied with the relationship between "substantial doubt" and "grave uncertainty." The *34 Court instead endorsed the universal opinion of the Courts of Appeals that equating reasonable doubt with "substantial doubt" is improper and potentially misleading in that it overstates the degree of doubt required for acquittal **1257 under the reasonable-doubt standard. See, *e.g., Smith v. Bordenkircher,* 718 F.2d 1273, 1276 (CA4 1983) (noting agreement with the "uniformly disapproving" view of the appellate courts regarding the use of the "substantial doubt" language), cert. denied, 466 U.S. 976, 104 S.Ct. 2355, 80 L.Ed.2d 828 (1984); see also *Taylor v. Kentucky,* 436 U.S. 478, 488, 98 S.Ct. 1930, 1935, 56 L.Ed.2d 468 (1978) ("[Equating 'substantial doubt' with reasonable doubt], though perhaps not in itself reversible error, often has been criticized as confusing"). [FN*]

> FN* Despite the overwhelming disapproval of the use of the phrase "substantial doubt" by appellate courts, some state trial courts continue to employ the language when instructing jurors. See *Bordenkircher,* 718 F.2d, at 1279 (dissenting opinion) ("As the majority has forthrightly pointed out, a 'good and substantial doubt' instruction has evoked a 'uniformly disapproving' response from appellate courts.... Evidently the slight slaps on the wrist followed by affirmance of the convictions have not served the hoped for end of correction of the error *in futuro* ").

In a final effort to distinguish the use of the phrase "substantial doubt" in this case from its use in *Cage,* the majority states: "In

any event, the instruction provided an alternative definition of reasonable doubt: a doubt that would cause a reasonable person to hesitate to act." *Ante,* at 1250. The Court reasons that since this formulation has been upheld in other contexts, see *Holland v. United States,* 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954), this "alternative" statement makes it unlikely that the jury would interpret "substantial" to mean "to a large degree."

To begin with, I note my general agreement with Justice GINSBURG's observation that the "hesitate to act" language is far from helpful, and may in fact make matters worse by analogizing the decision whether to convict or acquit a defendant to the frequently high-risk personal decisions people must make in their daily lives. See *ante,* at 1252 (opinion ***35** concurring in part and concurring in judgment). But even assuming this "hesitate to act" language is in some way helpful to a jury in understanding the meaning of reasonable doubt, the existence of an "alternative" and accurate definition of reasonable doubt somewhere in the instruction does not render the instruction lawful if it is "reasonably likely" that the jury would rely on the faulty definition during its deliberations. *Boyde,* 494 U.S., at 380, 110 S.Ct., at 1197. *Cage* itself contained proper statements of the law with respect to what is required to convict or acquit a defendant, but this language could not salvage the instruction since it remained reasonably likely that, despite the proper statements of law, the jury understood the instruction to require "a higher degree of doubt than is required for acquittal under the reasonable doubt standard." 498 U.S., at 41, 111 S.Ct., at 329.

In my view, the predominance of potentially misleading language in Victor's instruction made it likely that the jury interpreted the phrase "substantial doubt" to mean that a "large" doubt, as opposed to a merely reasonable doubt, is required to acquit a defendant. It seems that a central purpose of the

instruction is to minimize the jury's sense of responsibility for the conviction of those who may be innocent. The instruction goes out of its way to assure jurors that "[y]ou may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken"; and then, after acquainting jurors with the possibility that their consciences will be unsettled after convicting the defendant, the instruction states that the jurors should feel free to convict based on the "strong probabilities of the case." Viewed as a whole, the instruction is geared toward assuring jurors that although they may be mistaken, they are to make their decision on those "strong probabilities," and only a "substantial doubt" of a defendant's guilt should deter them from convicting.

The majority dismisses the potentially harmful effects of the "strong probabilities" language on the ground that a ***36** "nearly identical instruction" was upheld by the Court a century ago. See *ante,* at 1251, citing *Dunbar v. United States,* 156 U.S. 185, 199, 15 S.Ct. 325, 330, 39 L.Ed. 390 (1895). But the instruction in *Dunbar* did not equate ****1258** reasonable doubt with "substantial doubt," nor did it contain the phrase "moral certainty." As the majority appreciates elsewhere in its opinion, challenged jury instructions must be considered in their entirety. *Ante,* at 1243, quoting *Holland,* 348 U.S., at 140, 75 S.Ct., at 137 (" '[T]aken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury' "). Rather than examining the jury instruction as a whole, the majority parses it, ignoring the relationship between the challenged phrases as well as their cumulative effect.

Considering the instruction in its entirety, it seems fairly obvious to me that the "strong probabilities" language increased the likelihood that the jury understood "substantial doubt" to mean "to a large degree." Indeed, the jury could have a reasonable doubt about a defendant's guilt but still find that the "strong probabilities" are in favor of conviction. Only when a

reasonable doubt is understood to be a doubt "to a large degree" does the "strong probabilities" language begin to make sense. A Nebraska Federal District Court recently observed: "The word 'probability' brings to mind terms such as 'chance,' 'possibility,' 'likelihood' and 'plausibility'--none of which appear to suggest the high level of certainty which is required to be convinced of a defendant's guilt 'beyond a reasonable doubt.' " *Morley v. Stenberg,* 828 F.Supp. 1413, 1422 (1993). All of these terms, however, are consistent with the interpretation of "substantial doubt" as a doubt "to a large degree." A jury could have a large and reasonable doubt about a defendant's guilt but still find the defendant guilty on "the strong probabilities of the case," believing it "likely" that the defendant committed the crime for which he was charged.

To be sure, the instruction does qualify the "strong probabilities" language by noting that "the strong probabilities of ***37** the case" should be "strong enough to exclude any doubt of his guilt that is reasonable." But this qualification is useless since a "doubt of his guilt that is reasonable" is immediately defined, in the very next sentence, as a "substantial doubt." Thus, the supposed clarification only compounds the confusion by referring the jury to the "substantial doubt" phrase as a means of defining the "strong probabilities" language.

Finally, the instruction issued in Victor's case states that a reasonable doubt "is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, *to a moral certainty,* of the guilt of the accused." In *Cage,* the Court disapproved of the use of the phrase "moral certainty," because of the real possibility that such language would lead jurors reasonably to believe that they could base their decision to convict upon moral standards or emotion in addition to or instead of evidentiary standards. The risk that jurors would understand "moral certainty" to authorize convictions based in part on value judgments regarding the

defendant's behavior is particularly high in cases where the defendant is alleged to have committed a repugnant or brutal crime. In *Cage,* we therefore contrasted "moral certainty" with "evidentiary certainty," and held that where "moral certainty" is used in conjunction with "substantial doubt" and "grave uncertainty," the Due Process Clause is violated. 498 U.S., at 41, 111 S.Ct., at 329.

Just as in *Cage,* the "moral certainty" phrase in Victor's instruction is particularly dangerous because it is used in conjunction with language that overstates the degree of doubt necessary to convict. This relationship between the "moral certainty" language, which potentially understates the degree of certainty required to convict, and the "substantial doubt," "strong probabilities," and "possibly you may be mistaken" language which, especially when taken together, overstates the degree of doubt necessary to acquit, also distinguishes Victor's instruction from the one challenged in No. 92-9049, *Sandoval v. California.* See *ante,* at 1244. The ***38** jury instruction defining reasonable doubt in *Sandoval* used the phrases "moral certainty" and "moral evidence," but the phrases were not used in conjunction with language of the type at issue here--language that easily may be interpreted as overstating the ****1259** degree of doubt required to acquit. In other words, in Victor's instruction, unlike Sandoval's, all of the misleading language is mutually reinforcing, both overstating the degree of doubt necessary to acquit and understating the degree of certainty required to convict.

This confusing and misleading state of affairs leads me ineluctably to the conclusion that, in Victor's case, there exists a reasonable likelihood that the jury believed that a lesser burden of proof rested with the prosecution; and, moreover, it prevents me from distinguishing the jury instruction challenged in Victor's case from the one issued in *Cage.* As with the *Cage* instruction, it simply cannot be said that Victor's instruction

accurately informed the jury as to the degree of certainty required for conviction and the degree of doubt required for acquittal. Where, as here, a jury instruction attempts but fails to convey with clarity and accuracy the meaning of reasonable doubt, the reviewing court should reverse the conviction and remand for a new trial. See *Sullivan v. Louisiana,* 508 U.S., at 277- 288, 113 S.Ct., at 2083. I would vacate the judgment of the Supreme Court of Nebraska and remand the case.

II

Although I concur in the Court's opinion in No. 92-9049, *Sandoval v. California,* I dissent from the Court's affirmance of the judgment in that case. Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins v. Collins,* 510 U.S. 1141, 1143, 114 S.Ct. 1127, 1130, 127 L.Ed.2d 435 (1994), I would vacate the sentence of death in *Sandoval.* And, in view of my dissent in *Callins,* I also would vacate the sentence of death in No. 92-8894, *Victor v. Nebraska,* even if I believed that the underlying conviction withstood constitutional scrutiny.

APPENDIX F

ALFRED ARTHUR SANDOVAL
D-61000
Tamal, CA 94974

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALFRED ARTHUR SANDOVAL,	) Case No. _____) **DEATH PENALTY CASE**) **EXECUTION IMMINENT**
Petitioner,	) (Execution Date 12/12/94))
vs.	) REQUEST BY PRISONER) FOR APPOINTMENT OF
ARTHUR CALDERON, Warden of California State Prison at San Quentin,	) COUNSEL IN) CALIFORNIA DEATH) SENTENCE CASE AND) FOR STAY OF
Respondent.	) EXECUTION FOR DEATH) SENTENCE

Pursuant to Local Rules 36.8.4 (a)(iv) and 26.8.7(b), I, Alfred Arthur Sandoval, request that this Court appoint qualified counsel to represent me in federal habeas corpus proceedings that will be initiated on my behalf to seek relief from the judgment of death imposed against me by the Los Angeles County Superior Court.

For the appointment of counsel, I further request that the Court stay execution of my sentence, scheduled for December 12, 1994, and all court and other proceedings related to execution of that sentence, including preparations for the execution and the setting of a new execution date, for forty-five (45) days from the scheduled execution date.

In the event that counsel is not appointed to represent me

within the period of the initial stay of execution, I request that additional stays of execution be ordered as needed, and I authorize the Federal Defender to act on my behalf, to request such further stays of execution on my behalf until the Court appoints counsel to represent me.

This request is based on my attached declaration.

DATED: 12-6-94

/S/
ALFRED ARTHUR SANDOVAL

jp-12/5/94-san

REQUEST FOR APPOINTMENT OF COUNSEL
AND FOR STAY OF EXECUTION

PROOF OF SERVICE BY MAIL

RE: ALFRED ARTHUR SANDOVAL v. ARTHUR CALDERON

I, Lauren Kunkel, declare I am over 18 years of age and I am not a party to the within cause. My business address is 235 Pine Street, Suite 1300, San Francisco, CA 94104. I served a copy of the attached

REQUEST BY PRISONER FOR APPOINTMENT OF COUNSEL IN CALIFORNIA DEATH SENTENCE CASE AND FOR STAY OF EXECUTION OF DEATH SENTENCE

on each of the following by placing same in an envelope addressed (respectively) as follows:

DISTRICT ATTORNEY'S OFFICE
of Los Angeles County
18000 Criminal Courts Building
210 W. Temple Street, 18th Fl.
Los Angeles, CA 90012

MARY JAMESON
California Supreme Court
303 Second Street
South Tower - Eight Floor
San Francisco, CA 94107

ALFRED ARTHUR SANDOVAL
P.O. Box D-61000
San Quentin State Prison
San Quentin, CA 94974

SHARON WOODEN RICHARD
Deputy Attorney General
3580 Wilshire Blvd., Suite 800
Los Angeles, CA 90010

CLERK OF THE COURT
Los Angeles County
Superior Court
111 North Hill Street
Los Angeles, CA 90012

ARTHUR CALDERON
Warden
San Quentin State Prison
San Quentin, CA 94964

Each said envelope was then on December 6, 1994, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 6, 1994, at San Francisco, California.

/S/
LAUREN KUNKEL

ALFRED ARTHUR SANDOVAL
D-61000
Tamal, CA 94974

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALFRED ARTHUR SANDOVAL,	) Case No. _____
	) **DEATH PENALTY CASE**
	) **EXECUTION IMMINENT**
Petitioner,	) (Execution Date 12/12/94)
	)
vs.	) DECLARATION IN
	) SUPPORT OF REQUEST
ARTHUR CALDERON,	) BY PRISONER FOR
Warden of California	) APPOINTMENT OF
State Prison at San Quentin,	) COUNSEL IN
	) CALIFORNIA DEATH
	) SENTENCE CASE AND
	) FOR STAY OF
Respondent.	) EXECUTION OF DEATH
_____	) SENTENCE

I, Alfred Arthur Sandoval, in support of my request that this Court appoint counsel to represent me in federal habeas corpus proceedings that will be initiated on my behalf, and stay execution of my death sentence, declare under penalty of perjury:

1. I was sentenced to death on June 30, 1987, in the Los Angeles County Superior Court, State of California, case no. A760386. I am incarcerated at San Quentin Prison, Tamal, California.

2. My death sentence was affirmed by the California Supreme Court of December 14, 1992. People v. Sandoval, 4 Cal.4th 155 (1992). The United States Supreme Court granted

my petition for writ of certiorari, and it affirmed the judgment on March 22, 1994. Sandoval v. California, 551 U.S. __, 114 S.Ct. 1239 (1994).

3. On October 13, 1994, the Los Angeles County Superior Court set December 12, 1994, as the date for the execution of my sentence.

4. I intend to file a petition for writ of habeas corpus in this Court, alleging federal constitutional errors that entitle me to relief from the judgment of death. I need the assistance of counsel in preparing and litigating this petition.

5. The attorney who represented me in state court proceedings, Eric S. Multhaup of San Francisco, has advised me that he is not available to represent me in these federal habeas corpus proceedings.

6. I am indigent and do not have the assets to retain an attorney to represent me in these proceedings.

DATED: 12-6-94

/S/
ALFRED ARTHUR SANDOVAL

PROOF OF SERVICE BY MAIL

RE: ALFRED ARTHUR SANDOVAL v. ARTHUR CALDERON

I, Lauren Kunkel, declare I am over 18 years of age and I am not a party to the within cause. My business address is 235 Pine Street, Suite 1300, San Francisco, CA 94104. I served a copy of the attached

DECLARATION IN SUPPORT OF REQUEST BY PRISONER FOR APPOINTMENT OF COUNSEL IN CALIFORNIA DEATH SENTENCE CASE AND FOR STAY OF EXECUTION OF DEATH SENTENCE

on each of the following by placing same in an envelope addressed (respectively) as follows:

DISTRICT ATTORNEY'S OFFICE
of Los Angeles County
18000 Criminal Courts Building
210 W. Temple Street, 18th Fl.
Los Angeles, CA 90012

MARY JAMESON
California Supreme Court
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SHARON WOODEN RICHARD
Deputy Attorney General
3580 Wilshire Boulevard, Suite 800
Los Angeles, CA 90010

CLERK OF THE COURT
Los Angeles County
Superior Court
111 North Hill Street
Los Angeles, CA 90012

ARTHUR CALDERON
Warden
San Quentin State Prison
San Quentin, CA 94964

Each said envelope was then on December 6, 1994, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 6, 1994, at San Francisco, California.

/S/
LAUREN KUNKEL

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALFRED ARTHUR SANDOVAL,	) Case No. _____
	) **DEATH PENALTY CASE**
	) **EXECUTION IMMINENT**
Petitioner,	) (Execution Date 12/12/94)
	)
vs.	) [PROPOSED] ORDER
	) STAYING EXECUTION
ARTHUR CALDERON, Warden of California State Prison at San Quentin,	)
	)
Respondent.	)

Upon request of petitioner, and pursuant to Local Rules 26.8.4(a)(iv) and 26.8.7(b),

IT IS HEREBY ORDERED that the execution of petitioner's sentence of death, scheduled for December 12, 1994, and all court and other proceedings related to the execution of that sentence, including preparation for execution and the setting of a new execution date, are stayed for forty-five (45) days, to and including January 26, 1995.

IT IS FURTHER ORDERED, that this matter be referred to the Selection Board for the United States District Court, Central District of California, for suggestion of one or more counsel to be appointed to represent petitioner in these proceedings.

The Clerk of the Court shall give immediate telephonic notice to respondent, Arthur Calderon, Warden of San Quentin Prison, that petitioner's execution is stayed by order of this Court. The clerk of the Court shall also serve a certified copy of this order on petitioner; respondent, Arthur Calderon, Warden of San Quentin Prison; the Clerk of the

Angeles Superior Court; Sharon Wooden Richard, Deputy Attorney General of the State of California; and the District Attorney of Los Angeles County.

DATED: _____

_____
UNITED STATES DISTRICT JUDGE

PROOF OF SERVICE BY MAIL

RE: ALFRED ARTHUR SANDOVAL v. ARTHUR CALDERON

I, Lauren Kunkel, declare I am over 18 years of age and I am not a party to the within cause. My business address is 235 Pine Street, Suite 1300, San Francisco, CA 94104. I served a copy of the attached

[PROPOSED] ORDER STAYING EXECUTION

on each of the following by placing same in an envelope addressed (respectively) as follows:

DISTRICT ATTORNEY'S OFFICE
of Los Angeles County
18000 Criminal Courts Building
210 W. Temple Street, 18th Fl.
Los Angeles, CA 90012

MARY JAMESON
California Supreme Court
303 Second Street
South Tower - Eight Floor
San Francisco, CA 94107

ALFRED ARTHUR SANDOVAL
P.O. Box D-61000
San Quentin State Prison
San Quentin, CA 94974

SHARON WOODEN RICHARD
Deputy Attorney General
3580 Wilshire Boulevard, Suite 800
Los Angeles, CA 90010

CLERK OF THE COURT
Los Angeles County
Superior Court
111 North Hill Street
Los Angeles, CA 90012

ARTHUR CALDERON
Warden
San Quentin State Prison
San Quentin, CA 94964

Each said envelope was then on December 6, 1994, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 6, 1994, at San Francisco, California.

/S/
LAUREN KUNKEL

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALFRED ARTHUR SANDOVAL,	) CASE NUMBER) CV-94-8206-R)
PETITIONER,	) NOTICE OF FILING) DEATH PENALTY
VS.	) HABEAS CORPUS
ARTHUR CALDERON, RESPONDENT.	) PETITION)

Please be advised that the Death Penalty Habeas Corpus Petition referred to above was filed on 12-7-94 and assigned to Judge Manuel L. Real for all further proceedings.

CLERK, U.S. DISTRICT COURT

By: /S/
Deputy Clerk

cc: Clerk
Chief Deputy
Director, Office Operations
Bill Horrel, Courtroom Deputy
Death Penalty Habeas Corpus Law Clerk (Judge Real's Chambers)
Petitioner
California Attorney General
California Appellate Project
All Counsel of Record
Ninth Circuit Court of Appeals Death Penalty Coordinator

NOTICE TO COUNSEL FORM CLERK:

On all documents subsequently filed in this case, please designate DEATH PENALTY CASE next to the case number. This will flag the documents so that they will be processed expeditiously.

CV-16(11/92) NOTICE OF FILING DEATH PENALTY HABEAS CORPUS PETITION

DEATH PENALTY
LODGED
CLERK, U.S. DISTRICT COURT
DEC 7 1994
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

FILED
DEC 7 1994
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALFRED ARTHUR SANDOVAL,	)	Case No. 94-8206-R
	)	**DEATH PENALTY CASE**
	)	EXECUTION IMMINENT
Petitioner,	)	
	)	[Execution Date: 12/12/94]
ARTHUR CALDERON, Warden of California State Prison at San Quentin,	)	[PROPOSED] ORDER STAYING EXECUTION
	)	
	)	
Respondent.	)	

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IT IS FURTHER ORDERED, that this matter be referred to the Selection Board for the United States District Court, Central District of California, for suggestion of one or more counsel to be appointed to represent petitioner in these proceedings.

The Clerk of the Court shall give immediate telephonic notice to respondent, Arthur Calderon, Warden of San Quentin Prison, that petitioner's execution is stayed by order of this Court. The clerk of the Court shall also serve a certified copy of this order on petitioner; respondent, Arthur Calderon, Warden of San Quentin Prison; the Clerk of the Los Angeles Superior Court; Sharon Wooden Richard, Deputy Attorney General of the State of California; and the District Attorney of Los Angeles County.

DATED: December 7, 1994

/S/
UNITED STATES DISTRICT JUDGE
FOR MANUEL L. REAL

I hereby attest and certify on 12-7-94
that the foregoing document is a f ull,
true and correct copy of the original
on file in my office, and in my legal
custody.

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA (SEAL HERE)
0057

BY: /S/ Deputy

PROOF OF SERVICE BY MAIL

RE: ALFRED ARTHUR SANDOVAL v. ARTHUR CALDERON

I, Lauren Kunkel, declare I am over 18 years of age and I am not a party to the within cause. My business address is 235 Pine Street, Suite 1300, San Francisco, CA 94104. I served a copy of the attached

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Executed on December 6, 1994, at San Francisco, California.

/S/
LAUREN KUNKEL

APPENDIX H

MANUEL U. ARAUJO, ESQ., State Bar #65065
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Attorneys for Petitioner, ALFRED ARTHUR SANDOVAL

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALFRED ARTHUR SANDOVAL Petitioner, vs. ARTHUR CALDERON, as Warden of San Quentin State Prison, Respondent.	CASE NO. CV 94-8206-R **[DEATH PENALTY]** PETITION FOR WRIT OF HABEAS CORPUS

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APPENDIX I

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Attorneys for Petitioner, ALFRED ARTHUR SANDOVAL

UNITED STATES DISTRICT COURT

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Petitioner, ALFRED ARTHUR SANDOVAL, by and through his counsel, hereby respectfully petitions this court for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 et seq., and by this verified petition sets forth the following grounds for the issuance of such writ.

Petitioner's confinement is unconstitutional because his conviction, special circumstances findings and judgment of death were unlawfully imposed in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Petitioner is entitled to habeas corpus relief because he is innocent of two of the counts on which he was convicted, including that for which he received the death penalty; and he had a legitimate self-defense claim to the other two counts which was not adequately presented at the trial, resulting in a conviction obtained in violation of Petitioner's constitutional rights.

INTRODUCTION

> "Ghandi said we do this eye for an eye thing, make society require it and do it, what happens is the whole world becomes blind. . . Don't make the world blind, Don't push that button." (RT 6513)
> [Seymour Applebaum, defense attorney during closing argument - penalty phase].

> Mr. Appelbaum says don't play God. Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. . .
> "You are not playing God. You are doing what God says. . ."
> [Deputy District Attorney, David Milton, during closing argument--penalty phase].

Petitioner was charged in Los Angeles Superior Court Information No. A70386 with two counts of murder and a count of attempted murder arising from a shooting on October 14,

1984 (the Belvedere Park case) and two additional counts of murder arising from a shooting on October 31, 1984 (the Wells case). Trial began on November 25, 1986, and guilty verdicts were returned as to the Belvedere Park shootings on February 12, 1987, and as to the Wells shootings on February 23. The penalty trial began on March 2, 1987. During the penalty phase, over defense objection, the prosecutor argued to the jury that by rendering a verdict of death they would be doing God's work. After the trial court refused the defense request for a single unitary verdict, the jury returned three life verdicts and one death verdict, despite their earlier declared even split deadlock (CT 1681; 1733). The trial court subsequently denied petitioner's motions for new trial and to reduce the sentence, and imposed a judgment of death (CT 1743).

Petitioner, ALFRED ARTHUR SANDOVAL, As on death row in San Quentin Prison for reasons that are entirely unrelated to his guilt or innocence of the crimes for which he has been convicted and sentenced to death. Those reasons include the following:

1. The October 14 shooting occurred in Belvedere Park in East Los Angeles. Petitioner acknowledges that he shot two Hispanic males. He contends that he arrived at the park in the midst of a fight occurring between these men and another group of Hispanic males and that the shootings were in self-defense. Petitioner was unable to adequately present evidence in support of the self-defense claim because trial counsel failed to investigate and present at trial crucial witnesses to establish Petitioner's objective and subjective belief that his life and the lives of his friends were in jeopardy.

2. Mr. Sandoval filed a motion prior to trial seeking the right to represent himself In Pro Per. Plaintiff's trial counsel, court appointed and paid by the County of Los Angeles, failed to properly present the motion to the court and then failed to fully advise petitioner of the status of the motion. Despite a clear conflict of interest the attorneys disposed of the motion without petitioner's presence and without his informed consent.

3. Due to a combination of trial court error and ineffective assistance of trial counsel, Mr. Sandoval was not permitted to testify in his own behalf. First, the trial court improperly denied repeated motions to sever the Belvedere Park case from the later October 31 Wells shootings. This put Mr. Sandoval in a position where his desire to testify regarding the Belvedere Park incident would subject him to cross-examination on the Wells killings.

4. Despite the Court's ruling, Mr. Sandoval wanted to testify. He would have explained his actions in self-defense in the Belvedere Park shootings. Further he would have testified consistent with his alibi defense that he was in Tecate, Mexico, when an unknown person killed the Wells. He also would have testified that he never called Benny Verduzco to tell him that he had just killed the Wells. Despite Mr. Sandoval's desire to testify, his trial counsel refused to put him on the stand. This decision cannot be justified as reasonable trial strategy. Trial counsel failed to put on any evidence of self-defense to the Belvedere murder counts. Failure to put the defendant on the stand exacerbated trial counsels' failure to investigate and call witnesses that could have corroborated his self-defense claim.

5. Mr. Sandoval was also the one person who could have contradicted Benny Verduzco's testimony that on the night of the Wells murders petitioner had called Benny Verduzco to tell him that he killed them. Petitioner's defense to the October 31, shooting of Ray and Marlene Wells was that he was in Tecate, Mexico at the time of these shootings. Ray Wells was a local crime figure involved in drug dealing, car theft, receiving stolen property, and other illegal activities. There were no eyewitness identifications of any perpetrators to that shooting, or any physical evidence demonstrating petitioner's presence at the time of the offense. The prosecution's theory regarding the Wells shootings was based solely on an informer's testimony that the petitioner made an inculpatory statement to the informer in a subsequent telephone conversation. Mr. Sandoval presented an affirmative alibi defense to the charges but his trial

counsel failed to thoroughly investigate the many witnesses who could place Mr. Sandoval in Mexico at the time of the Wells shootings. Because of this tardy and incomplete investigation, Mr. Sandoval's trial attorneys were only able to put on two weak alibi witnesses who, because of their background, were susceptible to impeachment by the prosecution.

6. In addition to the self-defense and alibi evidence, defense counsel had available evidence of third party culpability for the Wells shootings but failed to adequately investigate and marshal this evidence in a manner that the trial court deemed admissible. To compound the problem, the evidence that was garnered by the defense was improperly rejected by the trial court. So, despite the fact that the defense in its opening statement promised the jury evidence of third party culpability no such evidence was ever presented.

7. With respect to the Wells shootings, the prosecution was totally dependent on the coerced testimony of informant Benny Verduzco regarding a purported extra judicial admission by Mr. Sandoval. Similarly, the prosecution relied heavily on the testimony of informer Carlos Tostado to negate the claim of self-defense regarding the October 14 Belvedere Park shootings. Notwithstanding significant questions regarding the informers' credibility, the prosecution failed to disclose crucial information regarding these witnesses' bias and reliability and the substantial benefits conferred on the informers as well as law enforcement threats and sanctions inflicted on both informers. As a result, the jury had a distorted view of the informers' credibility.

8. Indeed, subsequent to the trial, Benny Verduzco recanted his testimony and has repeatedly stated to a state habeas investigator, and alluded to in his written declarations, that he never received a telephone call from Mr. Sandoval admitting to the Wells killing.

9. Trial counsel failed to obtain crucial information regarding Mr. Sandoval's history of mental illness and failed to

present at either the guilt phase or penalty phase of the trial any evidence whatsoever regarding Petitioner's mental state. As described herein, Mr. Sandoval had a long history of abuse as a child as well as extensive and protracted drug use and a history of traumatic physical injury to the head. A reasonable inquiry into the medical condition would have revealed physiological, psychological and organic disabilities that trial counsel could have presented in support of both the self-defense claim as well as mitigation in the penalty phase of the trial.

10. Despite the limitations placed on Petitioner's ability to adequately present a substantive defense and the fact that as a result of improper voir dire by the prosecution, the jury was "uncommonly willing to condemn" Mr. Sandoval, the jury announced an unequivocal deadlock on the penalty trial after three and one-half days of deliberation. Instead of declaring a mistrial, however, the court instructed the jury to continue deliberations. The next day they returned with a seemingly arbitrary compromise verdict of life imprisonment with respect to counts 1, 2, and 3, and a verdict of death as to count 4.

11. A number of unusual and mutually reinforcing facts require reversal of the penalty verdict in this case. The prosecution permeated the penalty trial with impermissible aggravation by inflammatory gang evidence, argued Petitioner's age against him, improperly attacked defense counsel, and impermissibly urged the jury to imagine the suffering incurred by the victims families, present in court.

12. Perhaps most significantly, in terms of the probable impact on the jury, was the prosecution's statement during closing argument in the penalty phase of the trial that, by rendering a verdict of death, the jury would be "doing God's work." In language that the California Supreme Court has deemed improper (though not prejudicial) the deputy district attorney invoked the authority of the Bible as a justification for the death penalty and the higher authority of God as a reason to impose the death penalty in this case. Thus, the prosecution called on the jury to follow religious scripture as opposed to the

secular law of the State of California and the United States Constitution. The prosecution's interweaving of church doctrine and state law violated the defendant's rights under the First, Fourth, and Fourteenth Amendments of the United States Constitution. Swaying the jury's conscience by this method of rhetoric is antithetic to the First Amendment's requirement of the separation of church and state. This issue alone, in the context of the highly charged and evenly divided jury deliberations, requires reversal of the sentence of death.

13. The petition contains a number of other claims based on federal constitutional law, which individually and cumulatively undermined the fundamental fairness of the convictions and sentence in this case. The particulars of these claims are set forth below. The prejudice resulting from these habeas corpus claims is particularly acute with respect to the penalty decision in the case. In light of the difficulty of the penalty deliberations and the arbitrariness manifested in the final resolution, Petitioner asserts that any additional quantum of prejudice emanating from the habeas corpus claims must be deemed sufficient to require a new penalty trial.

JURISDICTIONAL ALLEGATIONS[1/]

1. Place of Detention: California State Prison at San Quentin, Tamal, California.

2. Conviction on which petition is based:

a. Nature of offenses: First degree murder with special circumstances, three counts of murder with special circumstances, one count of attempted murder.

b. California Penal Code Sections: 187, 190.2(a)(3)(b), 664/187, 12022.5

c. Name and location of sentencing court:

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1. The initial allegations are set forth in a manner consistent with this court's standard form for such petitions. See, **Rules Governing Section 2254 cases in the United States District Courts, Appendix.**

Superior Court of the State of California for the County of Los Angeles, Los Angeles, California.

d. Case No.: A760386.

e. Date of conviction: February 23, 1987

f. Date of sentence: May 15, 1987

g. Sentences: Death, three sentences of life without parole, twelve years

h. Plea: Not guilty

i. Kind of trial: jury.

j. Kind of trial: jury.

k. Did Petitioner testify at trial: No.

3. Did Petitioner appeal from conviction of sentence: yes.

4. a. Direct appeal:

(1) Name of court: California Supreme Court No. S004765, Criminal No. 26405.

(2) Result: Affirmed.

(3) Date of result: December 14, 1992

(4) Citation to state Supreme Court opinion: 4 Cal.4th 155, 14 Cal.Rptr.2d 342 (Cal.1992)

(5) In summary, the grounds asserted in the appeal included, but were not limited to, trial court error in:

i. The trial court committed prejudicial error in Denying Petitioner's Motion To Sever the Belvedere Park Murders From the Wells murders.

ii. The trial court erroneously permitted the prosecutor to systematically exercise his peremptory challenges to excuse those prospective jurors who had expressed some scruples about imposition of the death penalty but who were not excludable for cause under Witherspoon.

iii. The trial court committed prejudicial

error in allowing the prosecutor to repeatedly put irrelevant evidence of Petitioner's gang affiliation before the jury.

iv. The trial court unconstitutionally restricted Petitioner's right to present a defense to the Wells case by precluding evidence of third party culpability and evidence of other names found in Wells' address book.

v. The trial court committed prejudicial error in allowing the prosecutor to use Petitioner's prior conviction for impeachment purposes.

vi. The Trial Court violated petitioner's Fifth Amendment right to testify on his own behalf by effectively coercing his silence in refusing to rule on the scope of permissible cross examination of petitioner if he took the stand to testify on the Park case

vii. The prosecutor committed prejudicial misconduct by cross-examining the crucial defense witness in the Park case, Dr. Trockman, regarding his testimony in other cases in order to show the expert was "lying" to the jury in this case.

viii. The prosecutor committed multiple instances of misconduct in his improper cross-examination of the crucial alibi witness in the Wells case.

ix. Petitioner's convictions must be reversed because the prosecutor's pervasive and prejudicial misconduct during closing argument deprived him of Due Process and a Fair Trial.

x. The erroneously admitted evidence of

gang activities at the guilt phase prejudiced the penalty determination, particularly in light of the prosecutor's penalty argument. xi. Petitioner's death sentence was unconstitutionally imposed in light of the jury instruction that his age could, and the prosecutor's argument that it should, be considered as a factor in aggravation. xii. Petitioner's State and Federal constitutional rights to Due Process and Freedom from Cruel and Unusual Punishment were violated by the trial court's approval of the prosecutor's appeal for the jury to speculate and imagine the nature and magnitude of the suffering incurred by the decedents and their surviving families. xiii. The prosecutor violated Petitioner's rights to Due Process, and a Fair Trial, and Separation of Church and State. xiv. Petitioner's State and Federal Constitutional rights were violated by the trial court's refusal to declare a mistrial after the penalty jury's unequivocal declaration of deadlock. xv. Petitioner's State and Federal Constitutional rights to Due Process and Freedom from Cruel and Unusual Punishment were violated by the trial court's refusal to require the jury to return a unitary penalty verdict of death or life without parole. xvi. The penalty determination was tainted by a misleading instruction and improper argument regarding the weighing of aggravating and mitigating factors. xvii. The closeness of the penalty determination in

this case requires reversal because of the cumulative prejudicial effect of the multiple penalty phase errors and misconduct.

b. Petition for Rehearing:
   (1) Name of court: California Supreme Court.
   (2) Result: denied.
   (3) Date of result: February 10, 1993.
   (4) Citation to state Supreme Court opinion: 4 Cal.4th 155, 14 Cal.Rptr.2d 342 (Cal. 1992)
   (5) Grounds included, but were not limited to, that the court erred in:
   i. The trial court committed prejudicial error in allowing the prosecutor to repeatedly put irrelevant evidence of Petitioner's gang affiliation before the jury.
   ii. The trial Court unconstitutionally restricted Petitioner's right to present a defense to the Wells case by precluding evidence of third party culpability and evidence of other names found in Wells' address book.
   iii. Petitioner's State and Federal Constitutional rights to Due Process and Freedom from Cruel and Unusual Punishment were violated by the trial court's approval of the prosecutor's appeal for the jury to speculate and imagine the nature and magnitude of the suffering incurred by the decedents and their surviving families.
   iv. Petitioner was deprived of Due

Process, a Fair Trial, Separation of Church and State, and freedom from Cruel and Unusual Punishment by the trial court's erroneous failure to curb the prosecutor's invocation of biblical authority to argue for the death penalty as a form of doing "God's work".

v. Petitioner's State and Federal Constitutional Rights to Due Process and freedom from Cruel and Unusual Punishment were violated by the trial court's refusal to require the jury to return a unitary penalty verdict of death or life without parole.

c. Petition for Writ of Certiorari from direct appeal:

(1) Name of court: United States Supreme Court.

(2) Result: denied.

(3) Date of Result: March 22, 1994.

(4) Citation or number: 114 S.Ct. 1239 (1994)

(5) In summary, the grounds asserted in the writ included, but were not limited to:

i. Whether Petitioner was deprived of Due Process and a Fair jury trial by the use of Constitutionally defective reasonable doubt instructions which invited the jury to base its verdict on improper "moral" considerations rather than on an evidentiary evaluation.

ii. Whether Petitioner was deprived of Due Process and freedom from

Cruel and Unusual punishment by the California Supreme Court's failure to conduct a constitutionally adequate harmless error review of the fundamental error recognized in the penalty phase.

iii. Whether the California Supreme Court's astronomical affirmance rate since 1990, outstripping every other Capital sentencing jurisdiction in the country, demonstrates a pervasive abdication of its responsibility to conduct constitutionally adequate harmless error review, leaving unredressed the Constitutional violations in Petitioner's case. **(Pensinger v. California, 116 L.Ed.2d 290 (1991)** {O'Connor, J., joined by Kennedy, J., dissenting from denial of certiorari, finding the California Supreme Court's "cursory review...clearly insufficient"].)

5. Other than a direct appeal, has Petitioner previously filed any petitions, application or motions with respect to this conviction in any court, state or federal: yes.

6. a. (1) Name of court: California Supreme Court.

(2) Nature of proceeding: Petition for Writ of Habeas Corpus.

(3) Grounds included but were not limited to:

i. Petitioner was deprived of Due Process by the failure of the prosecution to disclose the extended course of coercion in which law enforcement alternately inflicted sanctions and conferred benefits to ensure Verduzco's testimonial cooperation.

ii. The prosecutor's knowing presentation

of false and misleading testimony to the jury, compounded by the prosecutor arguing the truth of that testimony, deprived Petitioner of Due Process and a Fair Trial.

iii. Petitioner was deprived of Due Process and a Fair Trial by the admission of Verduzco's involuntary and coerced November/December 1984 statements and trial testimony.

iv. Petitioner was deprived of Due Process and a Fair Trial by the introduction of false evidence against him at trial.

v. Petitioner was deprived of Due Process and a Fair Trial by the prosecution's failure to disclose additional sources of bias which skewed Verduzco's testimony against Petitioner.

vi. Petitioner was deprived of Due Process and a Fair Trial by the prosecution's failure to disclose evidence of other criminal cohorts of Ray Wells, including individuals involved in large-scale drug trafficking and pornography/prostitution, whose connections made it more likely that a falling-out with one or more of them caused the fatal retaliation of November 1, 1984.

vii. Petitioner was deprived of the Effective Assistance of Counsel in the Wells case by the failure of trial counsel to present available evidence of third party culpability.

viii. Petitioner was denied Due Process and a Fair Trial by the prosecution's failure to disclose threats inflicted and benefits

conferred on informer Carlos Tostado in return for his testimony.

ix. Petitioner was deprived of Due Process and a Fair Trial by the prosecution's knowing use of false testimony by Tostado.

x. Trial Counsel's failure to investigate and present any mental state defense at guilt phase of trial deprived him of effective assistance of counsel.

xi. Petitioner was deprived of the Effective Assistance of Counsel by Trial counsel's failure to investigate and present the best available evidence of violent assaultive conduct by the victims.

xii. Petitioner was deprived of his Fifth and Sixth Amendment Rights to Due Process, a Fair Trial, and Self Representation by the trial court's failure to grant his pretrial request to represent himself.

xiii. Petitioner was deprived of his State and Federal Constitutional Rights to Due Process and a Fair Trial by his exclusion from the critical proceeding at which his Faretta motion was addressed.

xiv. Petitioner was deprived of a full and fair penalty trial in light of newly discovered mental state mitigating evidence; or in the alternative, Petitioner was deprived of the Effective Assistance of counsel by trial counsel's failure to adequately investigate and present mental state mitigation.

xv. Petitioner was deprived of a full and fair penalty hearing because newly discovered evidence of childhood trauma

and abuse, far exceeding that presented at trial, was not presented to the jury.

xvi. Petitioner was denied Due Process and Equal Protection by the arbitrary and discriminatory imposition of the death penalty based on Unconstitutional factors related to himself and the victims.

xvii. Petitioner was denied Due Process and Constitutional protections afforded by the First and Eighth Amendment by the prosecutor's false and misleading argument to the penalty jury that the New Testament supported Capital Punishment in this case.

(4) Result: denied "on the merits."

(5) Date of Result: July 7, 1993.

(6) Case No. S026386.

7. Was an evidentiary hearing held: no.

8. Petitioner presently has no appeal or other proceedings pending in any other court regarding these convictions.

As set forth below, Petitioner is being held under convictions and sentence of death in violation of the constitution and laws of the United States.

FACTUAL BACKGROUND

Petitioner's childhood and adolescence were scarred by physical and psychological trauma, neurological damage, and serious, chronic drug and alcohol abuse. Expert testimony regarding Mr. Sandoval's mental impairments is relevant to his diminished capacity and lack of intent with regard to the offenses charged in the guilt and penalty phases of petitioner's trial, and with respect to mitigation and lingering doubt in the penalty phase. Petitioner's trial counsel failed to present at either the guilt or penalty phase of petitioner's trial this crucial evidence of mental impairment.

Mr. Sandoval's history of neurological deficit is significant. It is likely that he experienced prenatal insult from

such factors as poor nutrition, toxic exposure, and physical trauma from internal and alcohol ingestion. Both his parents were abusive and as a child Mr. Sandoval suffered many head blows. By first grade difficulties with concentration and learning were already apparent. His mother introduced him to alcohol at age six or seven and he was drinking regularly by age 11. He added glue sniffing shortly thereafter and mixed alcohol and barbiturates by age 13. All of these intoxicating substances aggravated the dysfunctions already present. None of his difficulties received any therapeutic attention. Mr. Sandoval's recollection of head blows began about age 12 and continued for the next ten years or so. He suffered at least 14 head blows involving loss of consciousness. A 1984 car accident exaggerated the effects of his heavy use of hallucinogens, alcohol, heroin, amphetamines, cocaine, and barbiturates. At the time of the Belvedere Park shootings in October, 1984, his mental state was clouded by brain damage, severe emotional trauma, and intoxication.

The results of neuropsychological testing show significant damage to Mr. Sandoval's right frontal lobe, the area of the brain which provides the function of impulse control, reflection, self-control, planning, and volition. He has been diagnosed as suffering from organic personality syndrome. His years of familial and environmental chaos, trauma, and violence also have left him with a post traumatic stress disorder. Mr. Sandoval's deficiencies leave him unable to react in a considerate and thoughtful manner. His reactions under situations of stress and surprise are virtually automatic, ill considered, rash and violent. Additionally, has completely lost his ability to refrain from substance abuse which further diminishes his capacity for self-control.

Mr. Sandoval's father died when the boy was seven years old. Shortly thereafter his mother virtually abandoned him and his siblings for a number of years, thus removing any semblance of adult stability in his life. Not only did he lack any positive reinforcement, but he was forced to provide some

semblance of structure for his younger brothers and sisters.

In addition to this extreme emotional deprivation as a child, Mr. Sandoval grew up in an environment of virtual warfare in his barrio neighborhood and correctional facilities. In the violent ghetto world where he was raised, Mr. Sandoval learned as a matter of survival that an attack could occur virtually at any time and that only an instantaneous, basically instinctual response would be adequate for self-preservation. His youth was filled with multiple physical traumas from fights, car accidents, and substance abuse. He consumed prodigious amounts of intoxicants, including glue sniffing, heroin, and LSD. The recurrent traumatic stresses in his life, in the context of an extremely violent and dangerous community, has caused post traumatic stress disorder in Mr. Sandoval as an adult. This disorder overlaps and exaggerates his avoidant--dependent personality disorder resulting from the lack of family structure through his developmental years. The resulting personality deficit renders him much less capable of reacting to unexpected confrontations or other stresses as another adult who had a more emotionally stable personality core. Moreover, the violence inflicted on Mr. Sandoval during his upbringing, in beatings by his step-father, fights with peers, automobile accidents, and substance abuse, established an organic brain disorder superimposed on the personality disorders. The result is a decrease in his ability to cope with stress, surprise, or the perception of danger in a reasoned and considerate manner. Rather, these debilitating influences combine to make Mr. Sandoval extremely vulnerable to impulsive unthinking reactions to traumatic situations. Under these circumstances, he had available a substantial mental state defense to the elements of both first and second degree murder with respect to the Belvedere Park shootings.

Belvedere Park Shootings.

On October 13, 1984, Mr. Sandoval was "hanging out" with a group of his friends including Steve Moriel, John Walters, and Ralph Ortega. Late in the evening Ralph Ortega

announced that he was going to Belvedere Park. Before leaving, Ortega left a gun in Mr. Sandoval's car. At about 2:00 a.m. people began to leave for home. Mr. Sandoval agreed to give Steve Moriel a ride home. Mr. Moriel lived by a Sheriff's substation. Mr. Sandoval worried that on driving Mr. Moriel home, he might be stopped by the Deputy Sheriffs and searched. Since he was on parole and possession of a weapon would be a parole violation, he decided to return the gun to Ralph Ortega at Belvedere Park. In the car with Mr. Sandoval were Steve Moriel, Eugene Valenzuela (also known as "Pelon"), and a man named Jack.

Mr. Sandoval located Ralph's car at Belvedere Park and pulled his own car into a parking stall. He saw Carlos Tostado, whom he knew, on his knees apparently looking for his car keys in the grass. He asked about Mr. Ortega's whereabouts.

At this point a man who Mr. Sandoval had not seen before, came on the scene and demanded that Mr. Sandoval say where he was from. In context, this was a hostile question calling for Mr. Sandoval to declare a gang affiliation as a prelude to a confrontation. Aware that most of the people on the scene had been taking drugs and drinking, Mr. Sandoval tried to diffuse what was suddenly becoming a dangerous confrontation. However, Eugene Valenzuela did not exercise the same restraint. He responded to the stranger in a similar belligerent tone. At this point, Mr. Sandoval saw another man who was accompanying the stranger reach around and under the back seat of his car. At this moment the man confronting Eugene put his hand in his front pocket. He and Eugene faced off for a few seconds swinging at each other. Eugene made a drunken swipe with his fist and the other man swung his arm with a metal weapon in his hand. Mr. Sandoval subsequently learned that the object was a razor sharp box cutter, but at the time did not know if it was a knife or a gun. A split second later he saw that his friend was bleeding. At this point Mr. Sandoval, believing the two strangers were attacking Eugene and him, pulled Mr. Ortega's gun out of his pocket and shot the man that had just

cut Eugene. He then shot the friend who charged Mr. Sandoval and finally shot at a third man who was initially charging but then appeared to go toward his car, in what Mr. Sandoval believed to be an attempt to get a weapon.

Present in the immediate vicinity and witnesses to the shootings were Steve Moriel and his two nieces. Mr. Moriel's nieces were sitting on Carlos Tostado's car parked in the Belvedere parking lot when Mr. Sandoval, Mr. Moriel and their other companions arrived.

After the shooting, Mr. Sandoval and his friends quickly left the park. Eugene was bleeding profusely from a fourteen inch cut on his upper torso. Mr. Sandoval took Eugene to the home of his friends, David and Helen Carbajal. The Carbajals helped Mr. Sandoval wash and patch Eugene's wounds. Mr. Sandoval then took Eugene home where he was berated by Eugene's girlfriend for permitting someone to get so dangerously close to Eugene and injuring him so seriously.

The next day Mr. Sandoval took Eugene to the home of another friend, Danny Villar. Villar helped him change Eugene's bandages. Later they took Mr. Valenzuela to Benny Verduzco's home where Bennie's mother re-bandaged the wound and applied antibiotics.

At the time of the shootings, Mr. Sandoval was both drunk and highly under the influence of cocaine. The alcohol and drugs exacerbated Mr. Sandoval's pre-existing neurological deficits, thus causing the situation in which his self-control was virtually non-existent. Moreover, during the previous 10 or 15 years both on the streets of East Los Angeles and while incarcerated he had seen many "kill or be killed" situations develop in which his friends had been seriously injured or killed because they failed to prepare and defend themselves quickly enough. This is the tragic reality of life in the barrio in which extends into the California Correctional System itself. At the time Mr. Sandoval pulled Ralph Ortega's gun from his pocket and started shooting, he was operating in a blind, instinctual reaction triggered by seeing the mental weapon slashing at

Pelon and feeling that these two strangers were launching a homicidal attack.

At trial the prosecution presented the testimony of Adela Rodriguez who explained that on the evening of October 14, 1984, she drove to Belvedere Park with a number of girlfriends plus Gilbert Martinez and Manuel Torres. Anthony Aceves and another man accompanied them in a different car. After arriving at the park, Adela walked off with Gilbert Martinez. A little later she heard her sister Zebba calling her back to the car where "there were some guys there fighting." While she was getting into the passenger side of the car, Gilbert Martinez said, "Let me get my friends first." The next thing she saw was Gilbert Martinez being shot with a gun about four inches from his head. She also saw Anthony Aceves being shot in the head. She identified Mr. Sandoval as the person who shot them. She also testified that Mr. Sandoval shot at Manuel Torres, who was running away.

Susan Martinez testified that she drove Adela and the others to Belvedere Park. She walked around the park with Anthony Aceves Aceves. She noticed another car in the parking lot, a white Monte Carlos. Later in the evening she walked back toward the car with Gilbert Martinez and Adela close behind. She saw an argument among several men, and fighting broke out among Carlos Tostado and others. The fighting apparently stopped and another older brown car pulled in between her car and Tostado's white Monte Carlo. She saw Mr. Sandoval standing outside the car talking with Anthony Aceves, with Gilbert Martinez nearby. She testified that Mr. Sandoval pulled out a gun and shot Gilbert Martinez and Anthony Aceves, then pointed the gun toward her car.

Carlos Tostado testified that he had been in two or three fights earlier on the evening of October 13 before arriving at Belvedere Park sometime after 2:00 a.m. on October 14. He was driving a white Monte Carlo and arrived with some friends, including David Martinez and some girls. Another car with four young girls and three men arrived and parked nearby.

Carlos got into a fight with one of the men. The fight was breaking up about the time a tan Monte Carlos drove up and two people got out, Mr. Sandoval and Eugene Valenzuela. Carlos testified that Mr. Sandoval grabbed one man by the neck and shot him after which he grabbed the second man and shot him as well. According to Tostado, the victims did not show any weapons or make aggressive gestures. Tostado admitted that when he initially gave statements to investigating police officers related a number of different stories about the shooting. He testified that he changed his testimony because he wanted to get out of the gang life, explicitly stated that he was testifying without any promises or benefits other than the court paying for the accommodation for his wife while he was in Los Angeles testifying. He admitted that he was on probation for a conviction relating to PCP use. He also stated that Mr. Sandoval had once saved his life by taking him to the hospital after Tostado had been stabbed ten times.

The prosecution read into evidence the Preliminary Hearing testimony of Manuel Torres, who died prior to trial in an unrelated automobile accident. Torres testified that he was at Belvedere Park with Anthony Aceves and Gilbert Martinez in the early morning hours of October 14. He did not see Gilbert Martinez being shot but he "saw Anthony go down." He heard shots but he "didn't see who shot him." Torres was himself shot in the neck but didn't see who shot him. Torres belong to the Marianna Marivilla gang, which was historically a rival of the Arizona Marivilla gang, but they were not "at war" in 1984. Marianna was then at war with Lote, another barrio gang.

Testimony of Sheriff's Deputy Woodrow West established that a pocket knife with blood on it was found near one of the bodies. West acknowledged that two days after the shooting he had questioned Carlos Tostado in great detail about the Belvedere Park shootings. Tostado said nothing about where people were positioned, who had guns in their hands, and said nothing about Mr. Sandoval grabbing either of the two victims.

Rather, Tostado told West that he, "Just saw the flash of a gun, did not see the gun itself." Tostado's identification of Sandoval as the shooter was not based on personal observation. Tostado acknowledged to West that he had been taking PCP on the night of the shootings and that he was intoxicated. In a subsequent interview on December 12, Tostado again said that he never saw Mr. Sandoval grab either of the victims around the head or shoulders, or put a gun to their heads. Tostado first revealed his asserted observation that Mr. Sandoval grabbed the two individuals and shot them just one week before his trial testimony.

Similarly, when Adela Rodriguez first told her story to sheriff's deputies on the night of the shooting, her description was significantly different from her trial testimony. She initially stated that she saw a fight, that Gilbert Martinez went over to help Anthony Aceves and she went back to her car where somebody pulled her in. Both Adela and Susan told sheriff's deputies that they saw some males fighting, then heard shots, they ducked down, and did not see the shooting itself. Similarly, Zebba Rodriguez said that she heard shots, ducked down, and when she raised her head she saw Gilbert Martinez and Anthony Aceves lying on the pavement. She could not identify anyone who might have done the shooting.

Both Gilbert Martinez Martinez and Anthony Aceves had such high levels of PCP in their blood, that, according to Pathologist, Dr. Thomas Griffin, they would have experienced "toxic psychosis" resulting in aggressive or assaultive behavior. Similarly, Dr. Donald Trockman, a forensic psychiatrist, testified that persons with the amount of PCP in their system such as Gilbert Martinez and Anthony Aceves were "unpredictable people" and that "they may attack you and try to kill you."

Completely missing from the guilt phase of trial was any evidence relating to Mr. Sandoval's own drug and alcohol use on the night of the shooting, or any evidence relating to his diminished capacity or lack of intent, his mental impairments,

psychological history, history of neurological deficit, history of chronic drug and alcohol abuse, or any testimony regarding the manner in which these factors contributed to the Belvedere Park incident. The jury never heard anything regarding Mr. Sandoval's mental state or the impact his brain damage, severe emotional trauma and intoxication had on the shooting.

Wells Shootings.

Mr. Sandoval took the car he had been driving on the night of the Belvedere Park shootings to the home of another neighborhood associate, Benny Verduzco. On October 24, some ten days after the Belvedere Park shooting, somebody called the police and told them that the car used in the shootings was stashed at Verduzco's house, and the police retrieved it. On or about October 24, Mr. Sandoval traveled to Tecate, Mexico, with several friends, including Ralph Ortega. Mr. Sandoval remained in the Tecate area until December, 1994. Specifically, Sandoval was present at the ranch on October 31, Halloween night. At trial, both Ralph Ortega and his wife, Terri Ramirez, testified that Mr. Sandoval accompanied them and their son into Tecate on Halloween night. It was October 31, 1984, at about 12:42 a.m. that Ray Wells and Marlene Wells were killed in their home on Harland Avenue in Baldwin Park.

At trial, Frank Bender, a neighbor of the Wells, testified that he heard gun shots at 12:42 a.m. on October 31, after he had returned home from work and was watching T.V. He opened the door and looked across the street where he saw a silhouette crossing the side portion of the Wells yard. The individual was medium height, medium build, wearing dark clothing, and with hair combed straight back. He did not actually see anyone get in or out of a car, but saw a car drive by his house with the lights on. He did not see how many people were in the car, but called the police and described as a black 1968 Chevrolet with thin white wall tires. According to Bender, the Wells had only lived in the house for two months, and he had seen "a steady stream of older male Mexicans coming in and out of the house" whom he described as "Cholo

types." Mr. Bender called the police and deputy sheriff Robert Havercroft responded. He found Ray Wells body on a couch in the living room and Marlene Wells body in the doorway between the dining room and the kitchen. Ray Wells had two large caliber gunshot wounds to the right side of his face and another gunshot wound to the top portion of his head. Marlene Wells had two gunshots to the left portion of her head near the ear.

A subsequent search of the Wells home by sheriff's deputies revealed a piece of paper with the names "Chato" (Sandoval's nickname) and "Pelon" on it. A number of address books were found in the Wells home. The police found no physical or forensic evidence that tied Mr. Sandoval to the Wells' murders. The only evidence linking Mr. Sandoval to the Wells shootings came from the testimony of police informant Benny Verduzco.

Verduzco testified that he had known Mr. Sandoval for about 16 years and previously been a member of the Arizona Maravilla gang. According to Verduzco, on October 15 or 16, 1984, Sandoval asked him to store a car, a brown Monte Carlo, in his garage because "he just said he had some kind of trouble." Verduzco agreed if he could take the wheels off the car. Sandoval came over to Verduzco's house again on October 24, while Ray and Marlene Wells were also there. According to Verduzco, Mr. Sandoval asked to borrow five dollars ($5) from Ray Wells, and left. No evidence was presented that Ray Wells and Mr. Sandoval spoke about the car that Verduzco was hiding for Mr. Sandoval. There was no testimony that Mr. Verduzco himself ever told Ray Wells or Marleen Wells that Mr. Sandoval was hiding his car in his garage. Nor was there any testimony that Ray Wells knew that Mr. Sandoval had shot and killed the two men at Belvedere Park. Someone called the police, but the prosecution made no showing that either Ray Wells or Marleen Wells made the call, or even that they knew that Mr. Verduzco was hiding Mr. Sandoval's car. The police did come on the night of October 24, 1984, to Mr. Verduzco's

home and seized Mr. Sandoval's car hidden in Verduzco's garage. However, there was no information that either Ray Wells or Marleen Wells called the police, or even that they knew that Mr. Verduzco was hiding Mr. Sandoval's car.

A week later, on October 31, in the early morning hours, Verduzco was at home with his wife when the phone rang. The call came in between one and two in the morning, and Verduzco identified Mr. Sandoval's voice, who allegedly said "Bennie I just did the big mouth in." Verduzco asked, "Who," and Sandoval allegedly said, "Remember the one who was there in the morning with the car." He did not use a name, but used the initial "R." According to Verduzco, Mr. Sandoval also said, "You know I take care of business. I had to do her, too." And, Verduzco attributed to Sandoval the comment, "They have gone to heaven with the angels," and "they wouldn't be snitching no more." Subsequent investigation reveals that Mr. Verduzco's testimony is perjured.

In the course of post-trial interviews, Mr. Verduzco admitted the following:

1. Sheriff's Deputy Havercroft, not Verduzco, initiated the idea of the telephone call that allegedly Verduzco received from Mr. Sandoval on October 31, 1984, admitting the Wells shootings. According to Verduzco, Deputy Havercroft kept asking questions and demanding that he talk about the call. Mr. Verduzco was suffering from heroine withdrawal and Mr. Sandoval was in Mexico, so Verduzco "just agreed with what Havercroft said." When he agreed, Havercroft let him go despite the fact that Verduzco had outstanding warrants.

2. While Mr. Verduzco testified at trial that on the morning of October 24, 1984, Mr. Sandoval came to his house while Ray Wells and Marlene Wells were there, he signed a post-trial declaration stating that he believes he appeared at Rio Hondo Municipal Court that morning. Investigation reveals that Mr. Verduzco did appear in the Rio Hondo Municipal court on October 24, 1984, for a felony preliminary hearing. The court continued the hearing and required a personal waiver of

the speedy trial rights. Because the matter was a felony, and not a misdemeanor, Mr. Verduzco needed to be present, and needed to personally waive his right to a speedy preliminary hearing. The magistrate did not issue a warrant for failure to appear. There is no indication that Mr. Verduzco did not appear in the mourning, as is the customary hour to call previously set felony preliminary hearings. Thus, contrary to his trial testimony, he could not have seen Marlene Wells, Ray Wells, and Mr. Sandoval on October 24, 1984, between 9:00 a.m. and 10:00 a.m.. This fact is crucial as it destroys the factual veracity of Mr. Verduzco's testimony.

According to Mr. Verduzco's testimony, during the early mourning of October 24, 1984, he saw the Wells and Mr. Sandoval together at his house. That was the same day that the police came to seize Mr. Sandoval's car from his garage. Thus, the date is very precise. Yet, this day is the only day, in which Ray Wells and Marlene Wells are with Mr. Sandoval and Mr. Verduzco. If as Mr. Verduzco now claims, he was in court the mourning of October 24, 1984, he could not have seen the Wells and Mr. Sandoval between 9:00 a.m. and 10:00 a.m.. Mr. Sandoval could not have made reference, during his alleged admission to the killings, to a nonexistent event. Further, if Mr. Sandoval did not see Ray Wells and Marlene Wells on the mourning of October 24, 1984, at Mr. Verduzco's home, then consistent with the People's theory there would be no factual basis to conclude that Ray Wells had "snitched" on Mr. Sandoval. The prosecution presented no other evidence that Ray Wells knew that Mr. Sandoval's car was hidden in Verduzco's garage, or that he knew of the involvement of Mr. Sandoval's car in the Belvedere murders. The facts do not support Mr. Verduzco's claim that Mr. Sandoval used the telephone to tell him during the early mourning hours of October 31, 1984, that he had killed "R" and explained whom he meant by saying further "[r]emember the one who was there in the morning with the car." Without the alleged meeting, this alleged admission has no meaning, and its veracity is in great

doubt.

3. Benny Verduzco also stated in the post-trial declaration that his girlfriend at the time, Jackie Meadows, answered the telephone on October 31, 1984, when Mr. Sandoval supposedly called, and could testify that they received no call from Mr. Sandoval. He has alluded to a State habeas investigator that she could help prove that he did not recieve a phone call from Mr. Sandoval. He now admits he was under the influence of heroin and that they had "just shot up." He states that he only "assumed" it was Mr. Sandoval. There is obviously a big difference between knowing the caller is Mr. Sandoval and assuming it was him.

4. The record, taken as whole, shows that the story Benny Verduzco tells about the telephone call allegedly received from Mr. Sandoval depends upon who he is talking to. He has, at various times, denied that the telephone call took place at all, acknowledged a telephone call but seems to indicate that it was initiated by law enforcement, not Mr. Sandoval, that he received a call but it wasn't from him, and, when interviewed by law enforcement, denies fabricating his testimony about the incriminating telephone call. As will be described more fully below, because Petitioner's sentence of death depends almost exclusively on the truthfulness of Benny Verduzco's testimony about the telephone call, all the facts and circumstances bearing on the reliability of Mr. Verduzco's trial testimony must be fully explored in the instant proceeding.

5. When Verduzco was rousted by police on the morning of November 1, and told that the Wells' were dead, Verduzco appeared genuinely surprised and shocked according to the interrogating officer. Verduzco said nothing to police about any telephone call until weeks later after he had been taken into custody on November 27. At trial, Verduzco testified that he "decided to testify in this case because I fear for my life" implying that he was in danger from Mr. Sandoval. He stated that the only benefits that he received in return for his testimony were the release from multiple concurrent state prison sentences

several months early and he was being given "room and board" in the amount of $600.00 a month until he got a job. He denied any other motive or bias against the petitioner or in favor of the prosecution. In fact, Verduzco was the recipient of a number of undisclosed benefits provided by law enforcement, including the following:

(1) When the police returned to Verduzco's home a couple of days after seizing Mr. Sandoval's brown Monte Carlo from Verduzco's garage, they found in the garage a white vehicle, recently stolen. Rather than arrest Verduzco for receiving stolen property or car theft, the police simply drove the stolen car out of Verduzco's garage and parked it around the corner, buying some good will for Verduzco's cooperation in the far more important homicide investigation.

(2) On November 27, 1984, Verduzco was subjected to an interrogation by the police in which he was told that they knew he had stolen most of the vehicles found at Ray Wells' house and that his sales of stolen cars to Wells could be prosecuted, and possibly implicate him in the Wells' murders. Verduzco, then suffering from heroin withdrawal and the threat of criminal prosecution, including a murder indictment, acquiesced to a story about a telephone call from Sandoval which was initiated by sheriff's deputies.

(3) Thereafter, police repeatedly threatened Verduzco and his common-law wife with arrest unless he cooperated with law enforcement.

(4) At trial, although Verduzco testified that he had not been in trouble in any of his other cases on November 27, 1984, implying that law enforcement had not particular leverage over him, the truth was that there was an outstanding bench warrant for him issued on November 21 for his failure to appear in court regarding a September 21 arrest for possession of heroin. Despite the existence of the warrant,

Verduzco was released upon giving the police the information they wanted about the Wells' shootings. What is more important, the prosecution did not disclose the true facts regarding the outstanding warrant, nor did it correct Mr. Verduzco's obvious lie.

(5) Verduzco was arrested on March 27, 1985, released on April 2; arrested later on April 2, 1985, released on April 3; arrested on April 4, 1985; and released. Thus he was subjected to painful heroin withdrawal during the time in which he was refusing to testify for the prosecution at the Sandoval Preliminary Hearing.

(6) Verduzco had at least four pending felonies in Los Angeles County, and was attempting through his attorneys in those cases to work out a favorable plea bargain. However, in retaliation for his refusal to testify against Sandoval, the Deputy District Attorney personally appeared at a sentencing proceeding and convinced the sentencing court to discard a contemplated County Jail disposition and imposed a state prison sentence instead. In September, 1985, Verduzco was sentenced to State Prison on four pending felonies.

(7) Toward the end of 1985 the deputy district attorney assigned to the case began calling the prison facility where Verduzco was incarcerated leaving messages for Verduzco to call him back. This round of communications from the prosecutor's office caused Verduzco great concern about being branded as an informer within the prison system.

(8) The district attorney obtained a removal order to get Verduzco brought to Los Angeles County Jail where he arranged with the Sheriffs Department to have Verduzco housed in the hospital facility, stigmatized as a place of protective custody for inmates who were cooperating witnesses. After

Verduzco had been in County Jail long enough to be identified as an informer because of where he was housed, the deputy district attorney told him that unless he testified he would never go back to prison but would be put on the main line of County Jail, that was tantamount to a death sentence for someone who had been stigmatized as an informer. Subjected to this lethal pressure, Verduzco finally relented and agree to testify. Thereafter, the district attorney's office arranged to have Verduzco's sentence recalled from the Department of Corrections and on November 1, 1986, he was released with a promise that his sentences would be commuted to time served, after his testimony.

(9) Moreover, Verduzco obtained a $1,500.00 cash payment from the witness protection fund on the date of his release. This cash payment was undisclosed to the defense or the jury.

(10) From November 1, 1986, through the time of his testimony, Verduzco supported himself by stealing, and was picked up on multiple occasions by East Los Angeles Sheriff's Deputies. He obtained his release without arrest each time by asking the arresting or detaining an officer to call Sheriffs, Detectives West, or Travis to confirm that he was a prosecution witness in a death penalty case. Verduzco was never arrested or prosecuted for these many offenses.

(11) On February 27, 1987, after the guilt verdicts had been returned but before the penalty trial, Verduzco committed another burglary in East Los Angeles and was caught by the homeowner, from whom Verduzco managed to escape. On March 2, the homeowner made a positive identification of Verduzco from a photo lineup. Police did not arrest him on this charge for more than a month, after the penalty trial had been completed and the death verdict

returned. The prosecution failed to disclose Verduzco's mid trial offense to defense counsel.

(12) Not only did the prosecution fail to disclose the "carrot and stick" approach taken with respect to Verduzco, but it is apparent from post-trial interviews with this witness that he is willing to say anything to anyone if he perceives a benefit to be derived therefrom. Thus, in post trial interviews, Mr. Verduzco has admitted his testimony to be untruthful in the following respects:

(a) On October 24, 1984, he had a court appearance in Rio Hondo Municipal Court. Although he does not recall if he went to that court appearance he believes that he did go in the mourning. Subsequent investigation reveals that as to Case No. A532809, he did appear at the Rio Hondo Municipal Court on October 24, 1984. The District Attorney's had charged him with a felony and he was thus entitled to a preliminary hearing within ten days, unless he personally waived his statutory right to a speedy preliminary hearing. In this case he did waive his statutory right to a speedy preliminary hearing and agreed to the date of November 21, 1984, plus thirty days thereafter to start his hearing. Had Mr. Verduzco not appeared, the court would have issued a bench warrant, and time could not have been waived.

(b) Although he testified that Ray Wells and Marleen Wells and Mr. Sandoval were at his house on October 24, 1984, he does not recall that they came over on that date. It was unlikely that they came over that morning since he was in court.

(c) When he got out of prison, he did not relocate but went to live with his sister Lea in

Glendale. He also "hung around" in the neighborhood, down on Arizona Street in East Los Angeles and El Monte. He never relocated from the Los Angeles area. He never changed his name. He was never part of any witness protection program. He did not look fir a job when he got out of custody. He just lived with his sister in Glendale. She let him live there for free. She even lent Mr. Verduzco a few dollars every now and then.

(d) The police gave Mr. Verduzco money to testify. He received cash from them. He never gave his sister Lea the money. He used the money for car payments and for clothes.

(e) In December of 1986, before Mr. Verduzco testified, the prosecutor David Milton, Travis and West made he went to Mr. Milton's office. Mr. Milton tried to get Mr. Verduzco to testify about the Belvedere Park shootings. He told him to "talk about what you heard on Kern Street." He wanted Mr. Verduzco to say that he was on Kern Street before the shootings at Belvedere Park and heard Chato planning to kill the two men who were shot in Belvedere Park. However, Mr. Verduzco told him that he did not know anything about Belvedere Park."

(f) Mr. Verduzco was very nervous before he testified. He could not sleep for several nights before testifying and got sick to my stomach. He took some codeine pills before he testified. Contrary to his trial testimony he did not know anything about something being said in East Los Angeles on the Belvedere Park shootings.

(g) Mr. Verduzco lied when he testified that he did not have a business relation with Ray Wells. He had done a lot of business with Mr. Wells.

The police officers who questioned him knew that Mr. Verduzco had sold stolen cars to Mr. Ray Wells. Mr. Verduzco believes this because the Sheriffs Deputies told him that they could prove that he had stolen the cars found at Mr. Wells' home. Yet, the prosecution never corrected his testimony regarding his relationship with Mr. Wells.

(h) Mr. Verduzco lied when he testified that Mr. Sandoval had called him and asked him to go to Mexico with him. One of Mr. Sandoval's friends in a red pickup truck asked Mr. Verduzco to go stay with Mr. Sandoval in Mexico.

(i) Mr. Verduzco lied when he testified that he was not in trouble with any case on November 27, 1984 when he was questioned by police. He knew that he had outstanding warrants under his own name and under his brother's name. He also knew that there were warrants under his alias "Eugene Ruiz" at that time. Mr. Verduzco also knew that detectives Travis and West could arrest him at any time concerning the stolen white Chevrolet they found in his garage.

(j) Mr. Verduzco lied when he testified that he did not recognize an exhibit with Eugene Valenzuela's ("Pelon's") and Mr. Sandoval's names and telephone number on it. He knew whose writing it was. The writing was that of Eugene Valenzuela. Eugene Valenzuela is a friend of Mr. Verduzco, and he recognized Mr. Valenzuela's handwriting.

(k) Mr. Verduzco lied when he testified that he did not recognize an exhibit with Ray Wells handwriting which had written on it "Mosses Verduzco" and Gonzales and Gonzales East 3rd

L.A." Ray Wells wrote it down when Mr. Verduzco called him and asked him to get him bail. Although Mr. Verduzco remembered the meaning of the writings on the paper, he lied about it at trial.

(l) Mr. Verduzco lied when he testified that the only thing he was getting for his testimony was one year early release. He also lied when he testified that he volunteered to cooperate with the police in November 1984 and in early 1986. He knew that the police could have charged him with stealing the white Chevrolet they found at his home; and that they could have charged him with stealing as many as six (6) cars that they found at Ray Wells home. Mr. Verduzco also knew that the police and the district attorney had harassed him with petty arrests when he refused to testify, and prevented him from getting the benefit of his plea bargains. Mr. Verduzco also knew that the real reason that he had agreed to testify in March 1986 was because the police threatened to have him killed by putting him in the Los Angeles County Jail without protective custody after they made him look like an informant. The police knew about the stolen cars. The police knew what would happen if they housed him in the snitch tank. And the police knew that Mr. Verduzco was in fear of his life because they were threatening to keep him in the county jail on the mainline.

The prosecution (including the investigating officers) did not do anything to correct his testimony that they knew to be untruthful.

PROCEDURAL BACKGROUND

A. Pretrial Matters.

On July 8, 1985, Petitioner was arraigned on information

No. A70386 in Los Angeles County Superior Court charging him with two counts of murder and a single count of attempted murder occurring on October 13, 1984, and two additional counts of murder occurring on October 31, 1984. A number of pretrial motions were heard, including a motion to sever the October 13 counts from the October 31 counts, which was denied on December 9, 1985. On February 18, 1986, the information was amended to allege a prior conviction, and a renewed motion to sever was denied. A third motion to sever the two sets of counts was heard and denied on September 23, 1986.

Petitioner recognized that his trial attorneys were not properly investigating this case. Based on that belief he filed a motion to have them relieved as trial counsel requesting the right to proceed pro se. However, the Superior Court never conducted a meaningful hearing on the matter. The judge instead deferred the decision until the next court date. However, the district attorney filed a motion pursuant to Civil Code § 170.6 to have the judge removed. At the next court hearing, outside the presence of Mr. Sandoval, and without his consent, his attorneys effectively withdrew the motion to have themselves relieved in exchange for law library privileges. Petitioner assumed based on what he had been told by his appointed counsel that the court had heard his motion and denied it on the merits. He never raised the issue again, believing that this was a final decision.

B. Guilt Phase of Trial.

Jury selection began on October 28, 1986, and the jury was sworn on November 25, 1986. The prosecution began its case on December 3 and rested on December 22. The defense case concluded on January 20, 1987, and all parties rested on January 26.

Prosecution evidence regarding the Belvedere Park shootings included the testimony of Adela Rodriguez and Susan Martinez, each of whom testified that they observed Petitioner shoot Anthony Aceves and Gilbert Martinez. Carlos Tostado

testified that he had been in two or three fights earlier in the evening. Although he acknowledged telling the police a number of different stories about what occurred, he testified that Petitioner grabbed one of the victims by the neck and shot him after which he grabbed the second man and shot him as well. The three witnesses gave conflicting versions of what occurred. Both victims had substantial amounts of PCP in their blood and small knife was found near one of the bodies.

With respect to the Wells shootings, Frank Bender, a neighbor of the Wells on Harland Avenue in Baldwin Park, testified that he heard gunshots at 12:41 a.m. on October 31. He opened the door and looked across the street where he saw a silhouette crossing the side portion of the Wells yard, medium height, medium build, wearing dark clothing and with hair combed straight back. He did not see anyone get in or out of a car but saw a car drive by his house with the lights on. He described the car as a black 1968 Chevrolet.

Benny Verduzco, the principal prosecution witness on the Wells counts, testified that Petitioner asked him to keep a car in his garage. Mr. Sandoval purportedly said that he wanted to store the car, a brown Monte Carlo because "he had some kind of trouble." Petitioner came to Verduzco's house again around October 24, while Ray and Marlene Wells were also there. He asked to borrow $5.00 from Ray Wells, and left. The police came to Verduzco's house that night and took Petitioner's car from the garage.

A week later on October 31, between 1:00 and 2:00 in the morning Verduzco received a telephone call. He identified Petitioner's voice who purportedly said "Benny, I just did the big mouth in." Verduzco asked "Who," and the person on the other line purportedly responded, "Remember the one who was there in the morning with the car." Verduzco also testified that Petitioner said, "You know I take care of business. I had to do her, too." Petitioner also commented, "They have gone to heaven with the angel" and "they wouldn't be snitching no more."

Ralph Ortega testified for the defense that he went to a ranch in Tecate, Mexico with several people, including Petitioner, on October 24, 1984. He specifically remembered that Petitioner was still at the ranch on October 31, because he took his son to the nearby town of Tecate for Halloween activities. Ortega's common-law wife, Terry Ramirez, confirmed that she arrived at the ranch on the evening of October 30, that Petitioner was there then, and that he accompanied her and Ortega into Tecate on Halloween.

C. Penalty Phase of the Trial.

The penalty phase case in aggravation consisted of evidence regarding three prior crimes by Petitioner including an incident in 1978 in which petitioner waved a rifle or shotgun at police, a 1979 shooting of a rival gang member named Ernest Leos, Jr., and a 1985 fight in Los Angeles County Jail with inmate Guy Walker.

The evidence in mitigation consisted primarily of testimony regarding Petitioner's dysfunctional family life and the barrio influences during his childhood. Petitioner's mother, Elizabeth Luna, his brother, Robert Sandoval, sister, Betty Martin, his wife, Michelle Trujillo Sandoval, and his son, Ernie Sandoval, eight years old at the time, all testified about the difficulty of his upbringing and the positive influences Petitioner had on his siblings and child, despite the extremely difficult conditions under which they lived. Sheriff Deputies, Ronald Hernandez and Anthony Campbell, who had observed Petitioner's in custody behavior, testified regarding his cooperation, helpfulness, and positive influence on other inmates. Richard Rodriguez, a gang consultant affiliated with the California Youth Authority, described petitioner as someone with a capacity to help others, even in prison, were he to serve a life sentence.

Similar to the guilt phase of the trial, the defendant again did not testify at the penalty phase, nor did defense counsel present any evidence regarding Petitioner's mental state. Defense counsel did attempt to present evidence regarding

lingering doubt in the form of third parties who had forged a change in Ray Wells double indemnity life insurance policy and who thus had a motive to have him killed. The court refused to permit this evidence to be presented to the jury.

D. Sentencing.

On May 15, 1987, the court held the probation and sentencing hearing. The court found that Petitioner's conduct indicated pre-meditation, that he engaged in a pattern of violent conduct indicating a serious danger to society, that the prior convictions were of increasing seriousness, that he had served prior prison terms and that at the time of the present offenses he was on parole. The court found no factors in mitigation. For the offense of murder of Marlene Wells, Count Four of the information, Petitioner was sentenced to death and as to Counts One, Two and Three, life imprisonment without possibility of parole.

CLAIMS FOR RELIEF

LACK OF FUNDAMENTAL FAIRNESS IN TRIAL PROCEEDINGS

I

PETITIONER'S TRIAL WAS SO PERMEATED BY INEFFECTIVE ASSISTANCE OF HIS APPOINTED COUNSEL AND PREJUDICIAL MISCONDUCT BY THE PROSECUTION THAT THE PETITIONER'S RIGHT TO FUNDAMENTAL FAIRNESS AT HIS TRIAL WAS VIOLATED.

Petitioner's convictions and sentences were rendered in violation of his rights to due process and fundamental fairness in violation of petitioner's constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, in that petitioner's trial was so

infected by ineffective assistance of his appointed trial counsel, the trial court's inability to insure minimal safeguards of due process, and numerous acts of misconduct by the prosecution that petitioner's right to fundamental fairness was violated. **Beck v. Alabama, 447 U.S. 625 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida, 430 U.S. 349 (1977).** Petitioner's right to fundamentally fair trial proceedings was heightened under the Eighth Amendment to the United States Constitution because this was a capital case in which death was the final and irreversible penalty.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, included the following:

1. Prior to trial petitioner's trial attorneys failed to adequately investigate information regarding witnesses who could corroborate petitioner's self-defense contention, interview witnesses and investigate circumstances establishing petitioner's alibi for the Wells shootings, and adequately investigate the facts and circumstances establishing third party culpability for the Wells shootings.

2. The prosecution used its peremptory challenges improperly by excluding Female Mexican-Americans and anyone who expressed reservations about the imposition of the death penalty.

3. The prosecution failed to disclose a pattern of inducements offered, benefits conferred, and coercion administered to prosecution witness Benny Verduzco in exchange for his testimony that petitioner admitted the Wells killings.

4. The prosecution repeatedly and improperly elicited testimony of petitioner's gang membership despite the fact that a gang association is not relevant to any of the issues in the case.

5. The prosecution failed to disclose to the defense threats inflicted and benefits conferred on informer Carlos Tostado in return for his favorable testimony.

6. The prosecutor knowingly presented false and misleading testimony regarding the failure of law enforcement to arrest Verduzco on outstanding warrants. Verduzco testified that he was not arrested in spite of four pending felony cases because there was a "mix up" in files. The truth was that law enforcement simply chose not to enforce the bench warrant as a means of exercising leverage over Verduzco.

7. Despite the long history of head trauma, childhood emotional trauma, physical abuse, chronic drug and alcohol use, resulting in right frontal lobe brain damage, trial counsel failed to adequately investigate and utterly failed to present at trial any mental state defenses. Petitioner's history of mental problems would have supported petitioner's self-defense and imperfect self-defense claims, and/or provided a basis for the jury to conclude that the killing at Belvedere Park was not premeditated and deliberate. The absence of premeditation and deliberation would have resulted in a second degree murder conviction.

8. The prosecutor committed multiple instances of misconduct in his improper examination of defense witness Ralph Ortega, including the repeated insistence that Ortega had conspired with defense counsel to mislead and lie to the jury, and the insinuation that Ortega was presenting false testimony at the direction of defense counsel.

9. The prosecution failed to disclose crucial information about Ray Wells' criminal dealings and the individuals with whom he was involved. Thus, petitioner was unable to fully investigate and present testimony at trial regarding third party culpability for the Wells killings.

10. During closing argument, the prosecutor improperly argued that defense counsel had knowingly presented false testimony, offered his personal opinion that the testimony was knowingly false, commented upon matters outside the evidence presented to the jury, commented upon the courtroom appearance of Mr. Sandoval despite the fact that Mr. Sandoval did not take the stand, commented to the jury about the

character of defense counsel and contended that the attorneys were intentionally misleading the jurors and urging witnesses to lie in court.

11. Trial counsel failed to present any mental state defenses at the penalty phase despite the crucial role this evidence would have played as a factor in mitigation pursuant to **California Penal Code § 190.3**. Moreover, defense counsel inexplicably refused to make available for in camera review by the trial court the file of its retained psychologist, instead choosing to withdraw the psychologist as a witness. As a result, no mental state evidence was presented at either the guilt or penalty phase of the trial. This was despite the fact that Mr. Sandoval suffers from a number of interrelated mental disorders.

12. The prosecutor in his closing argument improperly attempted to negate the mitigating force of defense evidence regarding Mr. Sandoval's difficult upbringing and the early death of his father by urging the jury to imagine that a photograph of the funeral of petitioner's father was in fact the funeral of the victims in the case and to speculate on the tragic effects of the victims' death on their families.

13. The prosecutor made an improper and highly prejudicial argument to the jury, paraphrasing from the Bible and arguing that a higher and independent source of law exists sanctioning the death penalty as the appropriate punishment in this case. This interjection of religious law as an additional factor for the jury's consideration was not based on the evidence and constituted an argument that God instructed the jury to vote for death.

II

PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT EVERY STAGE OF THE PROCEEDING.

Petitioner incorporates and reallege the allegations of the first claim for relief, above.

Petitioner's confinement is illegal because his convictions, the special circumstance findings, and the judgment of death were unconstitutionally imposed in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Such violations of Petitioner's constitutional rights occurred because he was deprived of his right to effective assistance of counsel at every stage of the proceedings. At each stage of this proceeding the attorneys for petitioner failed to meet the standard of reasonably competent counsel and, as a result, petitioner's convictions and sentences were rendered in violation of his rights to due process and equal protection, to a fair trial, to fair and reliable guilt and penalty determinations, to an impartial jury, and to be free from cruel and unusual punishment. The deficiencies described herein are a compilation of the more specific examples of ineffective assistance of counsel also discussed below at the appropriate stage of the proceeding. Individually and cumulatively, these shortcomings of counsel resulted in a violation of petitioner's federal constitutional rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. As will be described more fully below, trial counsel's performance was not "within the range of competence demanded of attorneys in criminal cases" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." **Strickland v. Washington 466 U.S. 668, 687 (1984).**

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery, and hearing, include the following:

1. Counsel failed to investigate prior to trial, failed to present evidence at trial, and failed to present new evidence which became available following the trial, which tended to establish Mr. Sandoval's innocence of the crime for which he was sentenced. There was no tactical or strategic reason not to investigate and present this evidence. Counsel's failures include the following:

(a) The police arrested Mr. Sandoval in December, 1984, for the Belvedere Park homicides and the October 31, 1984, murders. His trial commenced in October 1986. During these twenty-two months Mr. Sandoval complained to his attorneys that they continuously failed to locate and interview witnesses that supported his claim of self defense as to the Belvedere Murder case, and alibi defense as to the Wells murders. After fourteen months, and no discernible progress in the investigation Mr. Sandoval wrote Judge Morrow asking that his attorneys be removed because they had failed to timely investigate his witnesses. In part, he wrote Judge Morrow as follows:

> "I've requested this Marsden hearing so that I may bring to the attention of the court the conflict of interest that exists between these attorneys "Ms. Madelynn Koppel and Mr. Seymour Applebaum" and myself. I do not trust these attorneys or have confidence in their ability's as attorney's. I have been deceived by Ms. Kopple in the past. She was appointed by the court on February 7, 1985, sixteen months ago to represent me on these charges. I've given her and Mr. Applebaum a few names of my witnesses and as of yet none have been contacted by either these attorneys or the private investigators hired by these attorneys."

As reflected in his letter to Judge Morrow, Mr. Sandoval understood that time was of the essence in locating and interviewing the persons who were present at Belvedere Park on the night of the shooting and those who were with Mr. Sandoval in Tecate, Mexico, on the night of October 30, 1984 through October 31, 1984. Approximately sixteen months after being appointed to represent Mr. Sandoval, defense counsel had not interviewed Mr. Sandoval's self defense witnesses or alibi witnesses. These witnesses include the following:

(i) Eugene Valenzuela (aka "Pelon"). Mr. Valenzuela was present when Mr. Sandoval shot and killed the

two men at Belvedere Park. Mr. Valenzuela would have testified that he received a serious wound to his chest and abdomen when he was attacked by the two decedents. After Mr. Sandoval and Mr. Valenzuela arrived at the park, two men that Mr. Sandoval did not know or seen before, came on the scene and one of them demanded that Mr. Sandoval declare his neighborhood affiliation. In context, this was a hostile question calling for Mr. Sandoval to declare a gang affiliation as a prelude to a physical altercation. In response Mr. Valenzuela heard Mr. Sandoval say "I don't play that game anymore." However, Eugene Valenzuela did not exercise the same restraint. He responded to the strangers in a belligerent tone. At this moment the man confronting Mr. Sandoval put his hand in his front pocket. This action, under these circumstances is consistent with the person having and intending to use a weapon. Then this man with a metal object in his hand suddenly swung and struck Mr. Valenzuela. Mr. Valenzuela made a drunken swipe with his fist. A split second later, Mr. Valenzuela began bleeding. At this point Mr. Sandoval pulled Ralph Ortega's gun out of his pocket and shot the man that had just cut Mr. Valenzuela. He then shot the assailant's friend as he charged Mr. Sandoval and finally shot at a third man. Mr. Valenzuela could have testified that all of this occurred within a space of five to ten seconds. Mr. Valenzuela could have testified as to the wound he suffered, the fact that one of the decedents was the aggressor, and that Mr. Sandoval took him first to Mr. Carbajal's home and later to Mr. Villar's home for the purpose of having his wound attended.

Mr. Sandoval's trial attorneys attempted to establish through the testimony of Mr. Verduzco that Mr. Valenzuela had told him that he had been cut in early October 1984, at Belvedere Park. However, the trial court precluded the hearsay testimony as there was no foundation that it was an admission against penal interest, or that the defense could tie the injury to the Belvedere Park homicides. Thus, the defense was left with the fact that Mr. Valenzuela sustained a "scratch" on his chest

sometime in October 1984, but no evidence that he suffered the injury as part of a fight that led to the shooting of the two men at the park. Further, there was no evidence that Mr. Valenzuela incurred the large scar on his chest (later photographed by the detectives) as a result of a cut suffered during the altercation with Gilbert Martinez and Anthony Aceves leading to the killing at Belvedere Park. While the record suggests that the trial attorneys on the eve of trial attempted to locate and subpoena Mr. Valenzuela as a witness, it is Mr. Sandoval's contention that he could have been located and interviewed if counsel had initiated a prompt investigation at the outset of his case, and not waited some sixteen months or more to attempt to locate him.

Even if Mr. Valenzuela had not been available to defense counsel at any time, Mr. Sandoval provided the names of other percipient witnesses to the Belvedere murder case that trial counsel failed to contact and present as witnesses.

(ii) David and Helen Carbajal. Mr. Sandoval took Mr. Valenzuela to the Carbajal home immediately after the Belvedere Park shootings These individuals have information regarding the serious nature of the wound to the chest of Mr. Valenzuela. Trial counsel never contacted either witness.

(iii) Daniel Villar and Carol Holguin. Mr. Sandoval took Mr. Valenzuela to the Villar home later in the day of October 14, 1984. These individuals have information regarding the serious nature of the wound to the chest of Mr. Valenzuela. Trial counsel never contacted either Danial Villar or Carol Holguin. These witnesses would have corroborated the fact that Eugene Valenzuela was cut on the night of the Belvedere shootings and not some other night.

(iv) Hallie Valenzuela, Eugene Valenzuela's wife. Ms. Valenzuela could corroborate the fact that Eugene was seriously cut on the night of the Belvedere Park shootings. Trail counsel never contacted Hallie Valenzuela.

(v) Steve Moriel. Mr. Moriel a friend of Mr.

Sandoval, traveled to Belvedere Park with him, and witnessed the shootings. Mr. Moriel saw Mr. Valenzuela's wound and could have testified that it was bleeding profusely. In addition, Mr. Moriel could have supplied information as to the location of his two nieces who also witnessed the shooting as they sat on Carlos Tostado's car. However, defense counsel did not contact Mr. Moriel, and thus did not locate either of his nieces who witnessed the fight that led up to the killing of the two men at Belvedere Park.

(vi) Steve Moriel's nieces. These individuals were present at the Belvedere shootings. The police reports reflect that Adela Rodriguez recalled seeing two girls sitting on a white Monte Carlo. After the shooting, both nieces left the park with Mr. Sandoval and Mr. Moriel. The failure of defense counsel to locate and interview the above witnesses denied Mr. Sandoval the right to put on his claim of self-defense and the defense of others. It must be kept in mind that Mr. Sandoval due to the court's refusal to limit the prosecution's cross examination of him to the facts of the Belvedere Park homicides, and the insistence of his attorney's, did not testify. Because he did not testify, and because his attorneys failed to investigate the persons set forth above, Mr. Sandoval in effect put on no competent evidence establishing an affirmative defense that in order to prevent death or serious bodily harm to himself or another he needed to shoot and kill the two men at Belvedere Park. In the context of the evidence presented by the prosecution in this case, the failure to investigate was prejudicial.

(b) Counsel's failure to investigate in this case fell below the standards of competent counsel. This conclusion is especially clear in the context of the prosecution's evidence. Every prosecution witness' rendition of the facts varied from their initial statements to the police.

(i) At trial the prosecution presented the testimony of Adela Rodriguez who explained that on the evening of October 14, 1984, she drove to Belvedere Park with

a number of girlfriends plus Gilbert Martinez and Manuel Torres. Anthony Aceves and another man accompanied them in a different car. After arriving at the park, Adela walked off with Gilbert Martinez. A little later she heard her sister Zebba calling her back to the car where "there were some guys there fighting." While she was getting into the passenger side of the car, Gilbert Martinez said, "Let me get my friends first." The next thing she saw was Gilbert Martinez being shot with a gun about four inches from his head. She also saw Anthony Aceves being shot in the head. She identified Mr. Sandoval as the person who shot them. She also testified that Mr. Sandoval shot at Manuel Torres, who was running away.

Distinct in detail from her in court testimony was her statements to the police on the night of the shooting. On October 14, 1984, shortly after the Gilbert Martinez and Manuel Torres shooting the police interviewed Ms. Adela Rodriguez. At that time she told them that as she and Gilbert Martinez walked back toward the cars she could see a fight going on between the cars. "Gilbert Martinez went over to the fight to help Anthony." [Emphasis added]. She also remembered that she was pulled into her companion's vehicle and she sat in the passenger side. She remembers looking up toward a white Monte Carlo and seeing Gilbert Martinez standing by the rear fender. She saw a "guy who was big in the shoulders standing close to Gilbert and saw him shoot Gilbert in the head." She also saw this male shoot Anthony Aceves. She heard more shots but at this time had ducked down below the dashboard and could not see anything else.

Ms. Adela Rodriguez' October 14, 1984, statement is more consistent with Mr. Sandoval's recollection of the events than is her in court testimony. First, there was a fight occurring in the parking lot of the park. It was by the white Monte Carlo, and Gilbert Martinez was going to "help" Anthony Aceves not "go get Anthony." In addition, she did not contrary to Carlos Tostado's testimony see the "shooter" grab a hold of Gilbert Martinez or Anthony Aceves by the head as he shot them. It

appears that a fight ensued between Anthony Aceves and these other men. Gilbert Martinez went to help Anthony Aceves. Both were shot by one of the persons with whom they were fighting.

(ii) Susan Martinez testified that she drove Adela and her other friends to Belvedere Park. She walked around the park with Anthony Aceves. She noticed another car in the parking lot, a white Monte Carlos. Later in the evening she walked back toward the car with Gilbert Martinez and Adela close behind. She saw an argument among several men, and fighting broke out among Carlos Tostado and others. The fighting apparently stopped and another older brown car pulled in between her car and Tostado's white Monte Carlo. She saw Mr. Sandoval standing outside the car talking with Anthony Aceves, with Gilbert Martinez nearby. She testified that Mr. Sandoval pulled out a gun and shot Gilbert Martinez and Anthony Aceves, then pointed the gun toward her car.

As with Adela Rodriguez, the description of the events that Susan Martinez gave to the police on the day of the event is significantly different from her trial testimony. First, after it was decided that they wanted to go home, she saw a couple of men standing in the grass in front of the white car in an apparent argument. When Gilbert Martinez, Anthony Aceves and Manuel saw what was going on, they walked over to where the two men were arguing and Adela walked over to where she and the rest of the group were standing. She told the police that because everyone wanted to go home she yelled out to Gilbert Martinez and the other two guys (Manuel Torres and Anthony Aceves) "Let's go." However, she got no response. At that time she decided to leave. She told the police that at that time all here girlfriends walked over to and got into her car. She was left standing outside. She said that during that time there were approximately five guys standing in a group that had been arguing previously. During this time, she observed a man pull out a gun from an unknown location and start shooting. She saw this man shoot Anthony Aceves and then Gilbert Martinez.

She did not know that Manuel Torres had been shot.

As in the October 14, 1984, statements of Adela Rodriguez, Ms. Susan Martinez October 14, 1984, statements, establish that an argument of some kind was occurring shortly before the shooting took place. Her observations also suggests, that a fight occurred prior to the actual shooting. Both Adela and Susan told sheriff's deputies that they saw some males fighting, then heard shots, they ducked down, and did not see the shooting itself. Similarly, Zebba Rodriguez said that she heard shots, ducked down, and when she raised her head she saw Gilbert Martinez and Anthony Aceves lying on the pavement. She could not identify anyone who might have done the shooting. None of these witnesses October 14, 1984, statements nor their trial testimony supported Mr. Tostado's trial testimony that Mr. Sandoval grabbed Anthony Aceves and Gilbert Martinez around the neck and shot them.

(iii) Carlos Tostado testified that he had been in two or three fights earlier on the evening of October 13 before arriving at Belvedere Park sometime after 2:00 a.m. on October 14. He was driving a white Monte Carlo and arrived with some friends, including David Martinez and some girls. Another car with four young girls and three men arrived and parked nearby. Carlos got into a fight with one of the men. The fight was breaking up about the time a tan Monte Carlos drove up and two people got out, Mr. Sandoval and Eugene Valenzuela. Carlos testified that Mr. Sandoval grabbed one man by the neck and shot him after which he grabbed the second man and shot him as well. According to Tostado, the victims did not show any weapons or make aggressive gestures. Tostado admitted that when he initially gave statements to the investigating police officers he related a number of different stories about the shooting. He first spoke to Deputy D. Birtness at Belvedere Park. He told the Deputy Birtness that he saw two cars pulled up next to where he and the two victims were standing. Two men jumped out of the car. They asked if they (Carlos Tostado and the two victims) were from Arizona, then they were

"jumped." One of the men hit Mr. Tostado and he fell to the ground. He heard two gun shots, then two or three more gunshots. The suspected shooters got back into their cars and left. He told the police he believed the shooters were from "Lote," a Los Angeles area gang. Later in the evening of October 14, 1984, Mr. Tostado told Sergeant Travis and Investigator West that as the victims and the suspects were talking to each other, he approached them. As he approached he recalled being struck by someone and he fell to the ground. As he laid on the ground he heard at least two gunshots which he stated sounded similar to that of a .22 caliber. He said he heard the first shot, then a pause then a second shot. After hearing the two gunshots, he then heard a vehicle drive away.

Detective West testified that he questioned Mr. Tostado in great detail about the offenses: "Very specifically as to where people were positioned, which hand guns were held in, things of that nature, and Tostado said nothing" about petitioner grabbing either of the two individuals at the time of the shooting. To the contrary, according to Detective West, on October 16, 1984, Mr. Tostado said that he "just saw the flash of a gun, did not see the gun itself." Moreover, Mr. Tostado's identification of Mr. Sandoval as the shooter was based on inference rather than personal observation. In addition, Detective West believed that Mr. Tostado had told him that he had used PCP on the night of the shootings, but Detective West did not request a urine or other sample for drug testing from Mr. Tostado. Mr. Tostado admitted that he was on probation for a conviction relating to PCP use.

In a subsequent interview on December 12, Tostado again said that he never saw Mr. Sandoval grab either of the victims around the head or shoulders, or put a gun to their heads. Tostado first revealed his asserted observation that Mr. Sandoval grabbed the two individuals and shot them just one week before his trial testimony. No other witness observed Mr. Sandoval grab either victim immediately before shooting them.

While Mr. Tostado admitted that he

had told the previous versions set forth above, he testified that he changed his testimony because he wanted to get out of the gang life. He explicitly stated that he was testifying without any promises or benefits other than the court paying for the accommodation for his wife while he was in Los Angeles testifying.

(iv) The prosecution read into evidence the Preliminary Hearing testimony of Manuel Torres, who died prior to trial in an unrelated automobile accident. Torres testified that he was at Belvedere Park with Anthony Aceves and Gilbert Martinez in the early morning hours of October 14. He did not see Gilbert Martinez being shot but he "saw Anthony go down." He heard shots but he "didn't see who shot him." Torres was himself shot in the neck but didn't see who shot him. Torres belonged to the Marianna Marivilla gang, which was historically a rival of the Arizona Marivilla gang, but they were not "at war" in 1984. Marianna was then at war with Lote, another barrio gang. Testimony of Sheriff's Deputy Woodrow West established that a pocket knife with blood on it was found near one of the bodies.

Both Gilbert Martinez and Anthony Aceves had such high levels of PCP in their blood, that, according to Pathologist, Dr. Thomas Griffin, they would have experienced "toxic psychosis" resulting in aggressive or assaultive behavior. Similarly, Dr. Donald Trockman, a forensic psychiatrist, testified that persons with the amount of PCP in their system such as Gilbert Martinez and Anthony Aceves were "unpredictable people" and that "they may attack you and try to kill you."

(c) While the prosecutions witnesses were far from compelling, the failure of Mr. Sandoval's trial attorneys to put on any credible evidence of self defense, made it virtually impossible for Mr. Sandoval to establish that he needed to kill in order to save his life and/or the life of Mr. Valenzuela. Without the testimony of Mr. Sandoval, it was incumbent upon the defense if it wanted to present a theory of self defense to offer witnesses who could establish that self defense was a

necessity. However, Mr. Sandoval's trial counsel on the first day of trial had still failed to investigate his claim of self defense. In her opening statement Mr. Sandoval's trial counsel suggested to the jury that the issue was one of "identity." She never told them that they would prove that Mr. Sandoval killed in self defense. Mr. Sandoval alleges that she did not tell the jury that he would claim self defense because she had not investigated the defense.

The witnesses that defense counsel failed to look for and call to testify are set forth herein. Due to a lack of investigation, these witnesses were never presented to the jury. Because of their failure to investigate, the defense was left with vague references that some time in early October 1984, Mr. Valenzuela suffered a cut on his chest. The question never proved to the jury, how and when did Mr. Valenzuela suffer this injury? Instead, the defense was left with Mrs. Verduzco's (Benjamin Verduzco's mother) testimony that sometime in October she attended to Mr. Valenzuela's injury that she characterized as a scratch. Had trail counsel appropriately investigated the case they could have called witnesses who could have established that Mr. Valenzuela had been slashed on October 14, 1984, at Belvedere Park. These witnesses also could have established that the decedents had, with deadly force, attacked Mr. Valenzuela and Mr. Sandoval and that Mr. Sandoval was reasonable in shooting the two decedents in order to prevent the loss of his life or the infliction of great bodily injury.

The defense could not establish with the testimony of Mrs. Verduzco that the cut she saw in October 1984, was consistent with the scar photographed by Investigator West weeks after the October 14, 1984, Belvedere homicides. Factually the defense was left to argue that because Mr. Valenzuela suffered what Mrs. Verduzco described as a "scratch" sometime in October, Mr. Sandoval needed to kill two men. It was unreasonable for defense counsel to expect that the jury could conclude that Mr. Valenzuela suffered a life threatening injury on October 14,

1984, without some testimony establishing the date on which the injury occurred and the nature and extent of the injury!

Had the trial attorneys investigated, they would have found David and Helen Carbajal. Both of them would have testified that during the early morning hours of October 14, 1984, Mr. Sandoval brought Mr. Valenzuela to their home. Mr. Valenzuela suffered from a freshly bleeding deep slash that ran across his chest. The cut was over fourteen inches long and nearly an inch and a half wide. The wound was still bleeding heavily. In addition, trial counsel could have presented to the jury the testimony of Danial Villar and Carol Holguin that she later that morning attended to Mr. Valenzuela's wound. Trial counsel did not contact either Daniel Villar or Carol Holguin. Further neither trial counsel nor their investigators made any effort to locate these key witnesses. State habeas counsel found both Daniel Villar and Carol Holguin. Their declarations were presented in the state habeas proceedings.

In addition, had trial counsel timely investigated, they could have found Steve Moriel and/or his two nieces. However, trial counsel made no effort to find these potentially exculpatory witnesses. Steve Moriel and/or his two nieces at the very least would have established that Mr. Valenzuela suffered his gash between the time Steve Moriel, Mr. Sandoval, and Mr. Valenzuela arrived at the park and the time they left on October 14, 1984. These facts, had they been presented, would at the very least have created a reasonable doubt about whether the killings were murders in the first degree. That is, the evidence would have cast serious doubts about whether the murders were "deliberate and premeditated." A finding by the jury that the murders were not committed with deliberation or premeditation would have resulted in a finding of murder in the second degree. Further, the jury would have had a factual basis upon which to conclude that Mr. Sandoval acted in self defense or in the defense of another. The failure to attempt to locate the above witnesses denied Mr. Sandoval of effective assistance of counsel and denied him due process of law. His counsels'

failure to properly investigate, denied Mr. Sandoval a fair trial on the issues. No strategic reason exists for failure to investigate a potential defense.

(d) With regard to the Wells murders, trail counsel failed to investigate Mr. Sandoval's alibi defense. The failure to interview witnesses and investigate the circumstances establishing that petitioner was in Tecate, Mexico at the time of the Wells shootings denied Mr. Sandoval the due process right to present an effective defense. These witnesses include the following:

(i) Carol Holguin. Ms. Holguin provided medical assistance to Eugene following the Belvedere Park shootings and answered a phone call from Mr. Sandoval on October 31, 1984. Accordingly to the operator, the call was collect from Tecate, Mexico. Ms. Holguin's spoke briefly to Mr. Sandoval and recalled that she was wearing a witch costume when the call came in. A concurrent failure to investigate included the failure of defense counsel to secure the telephone toll records to determine the time and date of the collect call from Tecate, Mexico. The telephone toll records together with the testimony of Carol Holguin would have been compelling testimony corroborating Mr. Ortega's testimony that Mr. Sandoval was in Mexico on the night of the Wells murders.

(ii) Annette Luna. Ms. Luna was staying at Bennie Verduzco's house the night he supposedly received a telephone call from Petitioner.

(iii) Jackie Meadows. Bennie Verduzco's girlfriend, she was present when the alleged October 31, telephone call was supposedly received from Mr. Sandoval. She could have testified that Benny Verduzco never got the call on October 31, 1984, from Mr. Sandoval.

(iv) Mr. Sandoval told counsel about a number of individuals living and working in the Tecate area who could establish his presence there on October 30 and 31. Apparently no effort was made to locate any of these individuals.

(v) John Walters. Mr. Walters was with

Petitioner in Mexico in October, 1984. He could have corroborated the fact that Mr. Sandoval was in Mexico on the night of October 30 and October 31, 1984.

(vi) Benjamin Verduzco attended a court proceeding on the mourning of October 24, 1984, at the Rio Hondo Municipal Court. Trial counsel never sought the court records establishing this fact. Had they looked for these records they would have found that contrary to his testimony at trial, Mr. Verduzco could not have met with Mr. Sandoval, Ray and Marleen Wells on October 24, 1984, between 9:00 a.m. and 10:00 a.m.. This fact alone would have cast serious doubt as to the veracity of Mr. Verduzco's claim that Mr. Sandoval admitted killings the Wells. As noted elsewhere in this petition, defense counsel failed to present any evidence whatsoever of Petitioner's mental state, at either the guilt phase or penalty phase of the trial.

(e) Counsel was repeatedly unprepared to address the legal and factual issues that arose in the course of the trial. This included the failure to provide offers of proof requested by the trial court, failure to provide the trial court with legal authority for the various positions taken by counsel, and failure to anticipate and prepare for prosecution's evidence.

(f) Several crucial pieces of evidence promised by counsel during opening statement were not introduced into evidence at trial. The defense promised to prove that Mr. Wells was a known dealer of cocaine, and that many persons had a motive to kill him. The defense offered to prove that Mr. Wells had some drug connections who had not been paid for some recent drug transactions. These contentions were never proven nor was any evidence presented that remotely suggested a retaliation for failure to pay a drug sales debt. This constituted a gross deficiency in that trial counsel failed to adequately prepare the case, did not have a sufficient understanding of the rules of evidence to anticipate what evidence would and would not be admissible, and failed to provide an adequate explanation to the jury for the lack of evidentiary support.

(g) In consequence of the failure to investigate, develop and present to the jury any coherent theory for petitioner's defense, trial counsel presented to the jury in both the guilt and penalty phase proceedings incoherent witness examinations, testimony from witnesses called by the defense who irreparably damaged Petitioner's case and testimony from witnesses who had absolutely nothing to contribute to a comprehensive defense of Mr. Sandoval. There was no tactical or strategic reason to call these witnesses and elicit damaging information from them.

(h) Defense counsel failed to retain at all, failed to retain in a timely fashion, and failed to utilize effective experts to assist in Petitioner's defense.

(i) Defense counsel failed to obtain evidence showing that the prosecution testimony of informant witnesses was impermissibly coerced.

(j) Counsel failed to raise timely objections to very prejudicial and improper evidence offered by the prosecution. These instances of misconduct, which cumulatively resulted in a miscarriage of justice, include the following:

(i) Counsel filed a motion to sever the Belvedere Park case from the Wells case, but failed to provide the court with an offer of proof as to the testimony petitioner wished to give in the Belvedere Park case and his reasons for not wanting to testify in the Wells case; In addition, counsel failed to move for severance at the conclusion of the People's case, thus waiving the issue on appeal. The People, never established that the Wells were killed because they knew of the Belvedere murders and Mr. Sandoval's alleged involvement. No evidence was presented that Ray Wells and Mr. Sandoval spoke about the car that Verduzco was hiding for Mr. Sandoval. There was no testimony that Mr. Verduzco himself ever told Ray Wells or Marleen Wells that Mr. Sandoval was hiding his car in his garage. Nor was there any testimony that Ray Wells knew that Mr. Sandoval had shot and killed the two men at Belvedere Park. Someone called the police, but the

prosecution made no showing that either Ray Wells or Marleen Wells made the call, or even that they knew that Mr. Verduzco was hiding Mr. Sandoval's car. Nevertheless, defense counsel failed to move to sever the murder cases after the People rested.

(ii) Counsel objected to the trial court's ruling that Petitioner's prior conviction for assault with intent to commit murder would be admissible for impeachment purposes, but failed to give an offer of proof regarding an impact of the prior conviction on defendant's testimony;

(iii) Counsel argued that the trial court should have ruled on the scope of permissible cross-examination if Petitioner took the witness stand to testify on the Belvedere Park murders, but gave no details as an offer of proof indicating what Petitioner's testimony would be;

(iv) Defense counsel failed to object to the prosecution's argument that Petitioner's courtroom appearance (wearing a suit, wearing reading glasses, being clean shaven) was a "ploy;"

(v) Counsel failed to object during closing argument to prosecutorial misconduct interjecting improper personal opinion about the believability of witnesses, and disparity between promises defense counsel made in opening statement and the trial evidence.

2. Trial counsel failed to conduct an adequate investigation into petitioner's background in order to determine whether any viable mental state defenses existed which could and should have been presented at the guilt phase of the trial.

Specific deficiencies of trial counsel in this regard included the following:

(a) Trial counsel either failed to obtain or failed to adequately review petitioner's school, medical, jail, prison, counseling, and court records. These records would have alerted competent counsel that there were viable mental defenses which should have been investigated and presented at the guilt phase of petitioner's capital trial.

(b) Trial counsel failed to contact witnesses who

could have supported and amplified upon the information contain in the records described above and provided counsel with facts which would further have supported the existence of guilt phase mental defenses.

(c) Mr. Sandoval suffers from neuropsychological defects and organic brain damage which were suggested by the fact that he suffered severe abuse and neglect as a child, that as a child and adult he suffered from repeated head trauma, that he received blows to the head in a course of physical abuse as a child, and that he had a long history of drug and other substance abuse including glue inhalation, heroin, cocaine, and hallucinogens

(d) Petitioner suffers from significant right frontal lobe brain damage resulting from the multiple head trauma. Right frontal lobe area of the brain provides the function of impulse control, reflection, self-control, planning and volition. For years petitioner endured family environmental violence, chaos and trauma also left him with a post traumatic stress disorder.

(e) Petitioner's history of substance abuse was ample to suggest permanent brain damage from chronic substance abuse. In addition to psychological and organic disabilities he had a long history of traumatic stress resulting from his upbringing and a violence ridden milieu followed by incarceration in a dangerous and violent prison context.

(f) At the time of the Belvedere Park shootings, petitioner's state of intoxication contributed to and exaggerated the organically based mental deficiencies.

(g) If counsel had rendered effective assistance, they would have marshaled the evidence of petitioner's long history of mental problems and presented this evidence as part of petitioner's case in chief at the guilt phase of the proceeding. Trial counsel had no rational tactical reason for failing to present such evidence. The failure fell below an objective standard of reasonableness under the prevailing professional norms. But for trial counsel's failure in this regard, a

reasonable probability exist that the result of the guilt phase would have been more favorable to petitioner.

3. Petitioner was denied the effective assistance of counsel when trial counsel failed to investigate and develop the issue of petitioner's mental disabilities to be presented as a factor in mitigation at the penalty phase of trial. Given the evidence of post traumatic stress disorder, organic brain damage and substance addiction, counsel should have, at a minimum, marshaled the evidence showing extreme mental and emotional disturbances one of the substantial mitigating circumstances. Counsel should have undertaken at least the following:

(a) Obtain a specialist experienced in document and life history and character changes to assist counsel;

(b) Retain a licensed clinical psychologist to conduct neuropsychological testing;

(c) Retain the psychologist to study historical data, interviews, test results, and other information gathered concerning petitioner. Under the circumstances, the jury was not given the opportunity to consider petitioner's very serious mental disorders during the penalty proceedings.

In summary, trial counsel's acts and omissions, described above were not and could not have been the result of any sound strategic or tactical decisions, and Petitioner was substantially prejudiced as a result. The failure of Petitioner's trial counsel to provide effective assistance had a substantial and injurious effect or influence in determining the jury's verdict and rendered the guilt and penalty phases of Petitioner's trial unfair and the trial process unreliable. Accordingly, Petitioner's conviction and sentence must be overturned and he must be retried.

PRE-TRIAL ISSUES

III

PETITIONER WAS DEPRIVED OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, A FAIR TRIAL, SELF-REPRESENTATION AND EFFECTIVE

ASSISTANCE OF COUNSEL BY AN ACTUAL CONFLICT OF INTEREST BETWEEN HIMSELF AND HIS ATTORNEYS WHICH ADVERSELY AFFECTED HIS ATTORNEYS' PERFORMANCE AND RESULTED IN A DENIAL OF HIS CONSTITUTIONAL RIGHT TO ACT AS HIS OWN ATTORNEY

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I and II above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process, a fair trial, self-representation, and effective assistance of counsel because an actual conflict of interest between himself and his attorneys adversely effected his attorneys' performance and resulted in the denial of his constitutional right to act as his own attorney. The facts supporting this claim, among others to be presented at full investigation, research, analysis, discovery and hearing, include the following:

The Court appointed Petitioner's trial counsel. From the inception the County of Los Angeles paid trial counsel on an hourly basis. Upon counsels' termination as attorneys' of record for Mr. Sandoval, their compensation would end. Here Mr. Sandoval filed a motion to have his attorneys removed and to proceed to trial as his own attorney. An actual conflict existed between Mr. Sandoval and his court appointed attorneys. They acted to deny Mr. Sandoval his right to represent himself. Because an actual conflict of interest existed and this conflict of interest adversely effected his attorneys' performance, Mr. Sandoval's right to self-representation was denied. Per the standards set forth in **Cuyler v. Sullivan**, 446 U.S. 335 (1980), Mr. Sandoval is entitled to a new trial.

1. Petitioner's relationship with appointed counsel was marked from the outset by serious and substantial disagreements about major issues in the conduct of the case, particularly the sufficiency of investigation and the selection of

trial tactics. From the outset of the case and as the initial trial date approached, petitioner made numerous suggestions to counsel regarding witnesses to interview and avenues of defense to pursue. This included specifically the request that counsel attempt to locate and interview the following witnesses:

(a) David and Helen Carbajal, are the couple to whom Mr. Sandoval took Mr. Valenzuela ("Pelon") immediately after the Belvedere Park shootings. These individuals could testify to the serious nature of the gash to the chest area of Eugene Valenzuela on the night of the incident. Also Daniel Villar and Carol Holguin could have testified about the extent of the injury. This would contradict Carlos Tostado's testimony that the alleged decedents neither attacked Mr. Sandoval or his friend Mr. Valenzuela. Further, evidence of a serious gash running diagonally across the chest would lend support to a claim of self defense of defense of another;

(b) Steve Moriel, who was present at the Belvedere Park shootings. He could corroborate the belligerency of the decedents and the reasonableness of Mr. Sandoval's concern for his life and that of Eugene Valenzuela.

(c) Steve Moriel's nieces. These individuals, also present at Belvedere Park were never contacted, they would corroborate Mr. Sandoval's version of events.

(d) Eugene Valenzuela (aka "Pelon") who, while in the company of Mr. Sandoval, was attacked by the decedents with a knife. He could have established Mr. Sandoval's need to defend with deadly force.

(e) Mr. Sandoval also requested that counsel interview witnesses who were with him in Tecate, Mexico, at the time of the Wells murders. These included John Walters, Joey Trujillo, and Tecate residents who were with Mr. Sandoval on October 30 and 31, 1984;

2. While some other suggestions were followed through by trial counsel, Mr. Sandoval did not believe that he was given satisfactory explanations for omitting to locate and interview the persons set forth above. What especially vexed the

defendant is that he had told counsel that he wanted the persons set forth above interviewed and called as witnesses at the preliminary hearing, yet this was not done. While he understood, he did not agree with his attorneys' decision not to call witnesses at the preliminary hearing. He did not accept or understand why his attorneys had not attempted to make contact and interview his witnesses before the preliminary hearing. Upon complaining to counsel, counsel told him that it would all be taken care of in due time.

3. After several months of delays, and no perceivable progress in the investigation, Mr. Sandoval became convinced that trial counsel had not properly engaged in a thorough investigation. On or about April 30, 1986, Mr. Sandoval wrote to Judge Morrow asking that his court appointed attorneys be removed and that new counsel be appointed to represent him. Mr. Sandoval wrote to Judge Morrow in part as follows:

> "I've requested this Marsden hearing so that I may bring to the attention of the court the conflict of interest that exists between these attorneys "Ms. Madelynn Koppel and Mr. Seymour Applebaum" and myself. I do not trust these attorneys or have confidence in their ability's as attorney's. I have been deceived by Ms. Kopple in the past. She was appointed by the court on February 7, 1985, sixteen months ago to represent me on these charges. I've given her and Mr. Applebaum a few names of my witnesses and as of yet none have been contacted by either these attorneys or the private investigators hired by these attorneys. I advised Mr. Appelbaum in April of 1985 that I didn't feel Ms. Koppel was capable of handling this case. Mr. Applebaum said he needed her. I advised both of them that I was talking to other attorneys in hopes of finding one that could handle this case. Because of that, my calls were ignored and I would only talk with them in court, or maybe once a month to find out of any

progress in preparing my defense, which was and still is none. For these reasons I would ask this court to dismiss these attorneys and appoint new counsel to represent me in these matters before this court."

4. During June 1986, some four months before trial began, Mr. Sandoval filed and had placed on the court's calendar his motion to represent himself pursuant to **Feretta v. California,** 422 U.S. 806 (1975). On the July 2, 1986, pretrial hearing, he formally made a motion to represent himself. (RT A 118). At the hearing Judge Nelson in apparent recognition that the motion to dismiss his attorneys and proceed to trial pro se belonged to Mr. Sandoval, properly limited his address to Mr. Sandoval and only Mr. Sandoval. However, the trial court did not properly conduct a meaningful hearing into the merits of the motion or the competency of the defendant to conduct his own defense. The court asked Mr. Sandoval why he wanted to represent himself? Mr. Sandoval told Judge Nelson that as he had told Judge Morrow, he did not trust his court appointed attorneys. [A 119-120]. Never did Mr. Sandoval say that he wanted library privileges as an alternative to self-representation.

5. Initially the trial court did express concern regarding the defendant's ability to be ready for trial given the closeness of the existing trial date of July 28, 1986, (a date that appointed counsel was attempting to extend, and that was eventually continued upon defense counsel's motion to three months later). Judge Nelson then lectured Mr. Sandoval on the perils of self-representation. The transcript of the trial proceeding shows a one-sided colloquy in which Judge Nelson lectured Mr. Sandoval, but did not allow the defendant to set forth on the record why (besides his distrust of his attorneys) he wanted to represent himself. After lecturing Mr. Sandoval, and without giving Mr. Sandoval an opportunity to be further heard, the Court sua sponte deferred the hearing and ruling on the matter until July 9, 1986.

6. Petitioner's trial attorneys continued to work against

his interest even after he filed his motion on July 2, 1986, that they be removed. Sometime between July 2, 1986, and July 9, 1986, Ms. Kopple (Mr. Sandoval's court appointed attorney) telephoned the prosecutor, Mr. David Milton, and asked him to file a motion to remove Judge Nelson pursuant to Civil Code Section 170.6. Judge Nelson still had Mr. Sandoval's motion under consideration, yet in total disregard to her client's interest, she encouraged the prosecutor to file an affidavit of prejudice. After the prosecutor's conversation with Mr. Sandoval's court appointed attorney, the prosecutor filed the affidavit of prejudice under C.C.P. § 170.6. Judge Nelson was automatically removed and the case was reassigned to Department 100.

7. On July 24, 1986, the matter was called in Department 100. Before the Sheriff's Deputies could bring out the defendant from the holding cells (located in a room segregated from the courtroom) into the courtroom, counsel and the Judge Munoz began discussing trial dates.

8. Department 100 was then and still is set up so that the defendants are segregated in an enclosed area set approximately five feet from the nearest counsel table, and between fifteen and twenty feet from the judge's bench. The defendants neither come to the counsel table, nor do they approach the judge's bench. Department 100 had a microphone system so that a defendant can speak from the segregated enclosure. This system allowed the defendant to be heard by the court and other counsel. In addition, the microphone system generally enables the defendant to hear the judge when the judge speaks to persons in the room. However, the presiding judge in Department 100 routinely handled confidential ex parte matters at his sidebar, where only counsel would approach to the area of the court reporter, so that the ensuing conversation would be totally inaudible to either counsel for an opposing party, or to the defendant or any other person in the courtroom. Because of the nature of the ex parte conferences, this arrangement was created and used to ensure complete inaudibility to anyone

other than immediate participants.

9. In this case, the Sheriff Deputies brought out Mr. Sandoval in the normal manner and he never approached the judge's bench or his counsels' table. Mr. Sandoval's attorneys asked to approach the bench on "ex parte matters under 987.9." The court granted the request. Because of the courtroom arrangements, the microphone system was turned off by the judge. Neither counsel nor the court sought to include Mr. Sandoval in the discussion. Mr. Sandoval could not hear the ensuing colloquy between his appointed counsel and the court.

10. Mr. Sandoval's attorneys to assure their continuing representation of him and thus assure their future earnings, without Mr. Sandoval's consent or knowledge, bartered the defendant's right to self-representation for an illusory legal library privilege. In addition, Mr. Sandoval's attorneys misled the Court as to the true nature of Mr. Sandoval's concern. Outside the presence of Mr. Sandoval his attorneys engaged in a colloquy with Judge Munoz: They told the court in part as follows:

> MS KOPPLE: We have a client who ever since the preliminary hearing has been requesting law library privileges which he has been denied twice so far in the Municipal Court and by Judge Morrow. That is the reason he affidavited Judge Morrow. We did not affidavit. It was over our advise and over our objection, but we had no choice. . . . "
>
> * * * *
>
> MS KOPPLE: . . . he made a pro per request in front of Henry Nelson. That matter was never resolved. He wants to be pro per or he wants to go to the law library.
>
> * * * *
>
> THE COURT: Give me the booking number. I'll call the legal sergeant. I'm not going to order it. They have been pretty good about letting me - -
>
> * * * *

THE COURT: I'm not going to sign the order but I will call him and ask him [the legal sergeant] to let him use the privileges to prevent another pro per."

11. Ms. Kopple failed to tell the Superior Court that as recently as April 30, 1986, Mr. Sandoval had written a letter to Judge Morrow asking that she be "dismissed" from the case. She should have told the court that in his letter to Judge Morrow, Mr. Sandoval never mentioned library privileges as a suitable alternate remedy. She never told the court that Mr. Sandoval wanted her and Mr. Applebaum removed because they had failed to investigate his case. By her omissions she misled the court into believing that her client was merely making a play for a privilege limited to persons representing themselves or acting as co-counsel. Had she been true to her obligation to represent the interest of her client, she would have made a full disclosure and not knowingly omitted important information. Her actions resulted in a denial of Mr. Sandoval's right under the Sixth Amendment to represent himself.

12. The defendant could not and did not hear any of the colloquy between the judge and his attorneys. He did not authorize them to barter his request to have them relieved and to proceed pro se. Further, he never gave his attorneys permission to represent him on the motion. The defense attorneys acted unilaterally. Petitioner's attorneys knew that if the court granted Mr. Sandoval's motion to represent himself, they would be removed from the case and suffer a loss of future monetary earnings. Judge Munoz knew that the defendant had a motion pending requesting self-representation, yet Judge Munoz never addressed the defendant or allowed him to be heard on his motion.

13. The pending motion for self-representation put at issue the appropriateness of the continuing representation by petitioner's court appointed counsel. At the moment Mr. Sandoval filed his motion to remove his court appointed attorneys, an actual conflict of interest existed. If granted, the court appointed attorneys would have been relieved and the

defendant would have proceeded to trial in pro se. The court did not ask the defendant if he voluntarily withdrew his motion to represent himself, if he had consulted with his attorney's and authorized them to bargain for library privileges in exchange for a withdrawal of his Faretta motion, nor did the court inform him that his attorneys had made a bargain effectively exchanging his Faretta motion for library privileges. (RT A 138). Indeed, although Mr. Sandoval was the moving party in the Faretta motion, the court allowed the very attorneys the petitioner wanted to remove (and that he did not trust) to, in effect, withdraw the Faretta motion.

14. In further violation of their obligations to place Mr. Sandoval's Sixth Amendment right to self-representation before their own economic interest, his attorneys misled him. They told Mr. Sandoval that the court had not granted his Faretta motion, but had given him library privileges. This representation implied that the Court decided the motion on the merits. Based on this misrepresentation, the petitioner believed that his motion had been denied on the merits, and believing this to be a fact he concluded that he had no other options. Petitioner sought and was entitled to a ruling on his motion and did not consider the provision of law library privileges to be an acceptable alternative. Had Petitioner been privy to the ex parte exchange on July 24, he would have reasserted his desire to represent himself.

IV

PETITIONER WAS DEPRIVED OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND SELF-REPRESENTATION BY THE TRIAL COURT'S FAILURE TO GRANT HIS PRETRIAL REQUEST TO REPRESENT HIMSELF.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through III, above.

Petitioner's convictions and sentences were rendered in

violation of his rights to due process and a fair trial, because the court failed to grant or even consider the merits of his motion to represent himself, in violation of petitioner's federal constitutional rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. Petitioner's relationship with appointed counsel was marked from the outset by serious disagreements about major issues in the conduct of the case, particularly the sufficiency of investigation and the selection of trial tactics. From the outset of the case and as the initial trial date approached, petitioner made numerous suggestions to counsel regarding witnesses to interview and avenues of defense to pursue. This included specifically the request that counsel attempt to locate and interview the following witnesses:

(a) David and Helen Carbajal, the couple to whom Mr. Sandoval took Mr. Valenzuela immediately after the Belvedere Park shootings. These individuals could testify to the serious nature of the gash to the chest area of Eugene Valenzuela on the night of the incident;

(b) Steve Moriel, who was present at the Belvedere Park shootings. He could corroborate the belligerency of the decedents and the reasonableness of Mr. Sandoval's concern for his life and that of Eugene Valenzuela;

(c) Steve Moriel's nieces. These individuals, also present at Belvedere Park were never contacted, they would corroborate Mr. Sandoval's version of events.

(d) Mr. Sandoval also requested that counsel interview witnesses who were with him in Tecate, Mexico, at the time of the Wells murders. These included John Walters, Joey Trujillo, and Tecate residents who were with Mr. Sandoval on October 30 and 31, 1984.

2. Counsel did not follow through on these requests and Mr. Sandoval was not given a satisfactory explanation of the

failure to attempt to locate and interview these witnesses. Therefore, in June, 1986, four months prior to trial, Petitioner decided he would be better off representing himself. He requested that his case be placed on calendar for a Faretta motion and on July 2, 1986, he made a formal written request to represent himself.

3. Petitioner had the constitutional right to represent himself so long as he voluntarily and intelligently elected to do so. **Faretta v. California, 422 U.S. 806, 95 S.CT. 2525 (1975)**. That right was violated by the court's failure to make any inquiry as to whether petitioner's election was voluntary and intelligent.

4. Petitioner is a very articulate and thoughtful person who was capable of representing himself. The trial court asked why petitioner wanted to represent himself and petitioner twice responded that he did not trust his appointed counsel. The court asked whether petitioner would be ready to try the case on the then existing trial date of July 28. Petitioner responded, "No, but not too much later than that." The trial court stated that "one of the problems" was that "your motion is not timely," but then proceeded to give petitioner an extended lecture about the perils of self-representation after which he said, "Come back next week and let's talk some more." Petitioner responded, "This isn't like it was just overnight, your Honor. . . I thought about this." The court did not rule on Petitioner's motion but put the matter over to July 9. On that day, however, the prosecutor filed an affidavit of prejudice under C.C.P. § 170.6, and the case was transferred to Department 100.

5. On July 24, 1986, the matter was heard by presiding Judge Munoz. The configuration of the courtroom was such that defendants are kept in a holding area which is physically separate from the area where the counsel table and the bench are located. There is a microphone in the holding area into which a defendant can speak when necessary, and microphones on the counsel table. During the hearing Mr. Sandoval remained in the holding area. While he was physically present in the

courtroom, he was not able to hear or participate in the ex parte proceedings which were handled at the sidebar. At sidebar only counsel could approach to the area of the court reporter, so that the ensuing conversation was totally inaudible to either counsel for an opposing party at counsel table, or to the defendant or any other person in the courtroom. It was during the sidebar proceedings that counsel brought up the fact that Mr. Sandoval's pro per motion previously brought before Judge Nelson was unresolved. Judge Munoz took the action of providing law library privileges for Mr. Sandoval "to prevent another pro per." After the ex parte proceedings, counsel explained to Mr. Sandoval that Judge Munoz had denied the motion but granted the law library privileges. (The prosecutor had those privileges rescinded a few days later in other ex parte proceedings).

6. Petitioner remained extremely dissatisfied with his counsel, but saw no viable option at the time, believing his motion to have been adjudicated against him on the merits. In fact, the trial court did not seriously consider nor exercise his discretion on the merits of Petitioner's motion but rather avoided ruling on it by providing the law library privileges. Petitioner was excluded from the proceedings and never acquiesced to this compromise. Petitioner sought and was entitled to a ruling on his motion and did not consider the provision of law library privileges to be an acceptable alternative. Had Petitioner been privy to the ex parte exchange on July 24, he would have reasserted his desire to represent himself.

7. The presiding judge violated Petitioner's constitutional right to represent himself by failing to inquire of Petitioner as to the reasons for wanting to be Pro Per, for failing to exercise his discretion on the merits of the request, and for failure to grant the motion in the face of Petitioner's motion to represent himself filed July 2, 1986, and pending on July 24, 1986. As a result, Petitioner was denied his Fifth and Sixth Amendment rights to due process, a fair trial, and self-

representation. These errors had a substantial and injurious effect or influence in determining the jury's verdict and rendered the guilt and penalty phases of Petitioner's trial unfair and the trial process unreliable. Accordingly, Petitioner's conviction and sentence must be overturned and must he must be retried.

V

PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY HIS EXCLUSION FROM THE PROCEEDINGS AT WHICH HIS FARETTA MOTION WAS ADDRESSED.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through IV, above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process and a fair trial because petitioner was excluded from the proceedings at which his Faretta motion was addressed, in violation of petitioner's federal constitutional rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. As noted above, Petitioner was excluded from any personal participation in the July 24, 1986, ex parte hearing on his motion to represent himself in pro per. While he was physically present in the courtroom, he could not hear the proceedings which occurred at sidebar and he could hear any of the statements made by the court or counsel.

2. The determination of a Faretta motion is a critical stage of the criminal proceedings at which the defendant's right to be present and meaningfully participate. Had Petitioner been privy to the hearing, he would have declared his intent and desire to represent himself, would have explained to the court

that the provision of law library privileges is not a satisfactory alternative, and would have explained his continuing reasons for wanting to represent himself.

3. Petitioner did not waive his right to be present. Following the proceeding, his attorney advised him that his motion was not granted and that he was given library privileges instead. Petitioner was not advised of the true facts: That the court did not consider the merits of the motion or inquire into the underlying dispute between Petitioner and his attorney sufficient to determine the motion on its merits. Petitioner believed that his motion had been adjudicated and denied on its merits and therefore believed he was foreclosed from raising the matter subsequently.

4. Petitioner was denied rights guaranteed to him by the due process clause of the Fifth and Fourteenth Amendments. This error had substantial and injurious effect or influence in determining the jury's verdict and rendered Petitioner's trial unfair

VI

THE TRIAL COUNSEL FAILED TO CONDUCT AN ADEQUATE AND TIMELY GUILT PHASE INVESTIGATION.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through V, above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process and equal protection, to a fair trial, to the effective assistance of counsel, and to fair and reliable guilt and penalty determinations because trial counsel's representation was ineffective at the guilt phase of trial, in violation of petitioner's federal and constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. Counsel failed to either interview or adequately investigate prior to trial information regarding witnesses who could corroborate petitioner's contention of self-defense with respect to the Belvedere shootings. These witnesses include the following:

(a) Eugene Valenzuela. Mr. Valenzuela was present at the Belvedere Park incident and received a serious wound to his chest and abdomen when he was attacked by the two decedents.

(b) David and Helen Carbajal. Mr. Sandoval took Mr. Valenzuela to the Carbajal house immediately after the Belvedere Park shootings These individuals have information regarding the serious nature of the wound to the chest of Mr. Valenzuela.

(c) Daniel Villar and Carol Holguin. They could have testified that in the late mourning of October 14, 1984, Mr. Sandoval brought to their home Mr. Valenzuela who had a fresh fourteen inch cut on his chest that continued to bleed.

(d) Halie Valenzuela, Eugene Valenzuela's wife. Ms. Valenzuela could corroborate the fact that Eugene was seriously cut on the night of the Belvedere Park shootings.

(e) Steve Moriel. Mr. Moriel was a friend of Mr. Sandoval, traveled to Belvedere Park with him, and was a witness to the shootings.

(f) Steve Moriel's nieces. These individuals were also present at the Belvedere shootings.

2. The failure to interview witnesses and investigate the circumstances establishing that petitioner was in Tecate, Mexico at the time of the Wells shootings. These witnesses include the following:

(a) Carol Holguin. Ms. Holguin provided medical assistance to Eugene following the Belvedere Park shootings and answered a phone call from Mr. Sandoval on October 31, 1984. Accordingly to the operator, the call was collect from Tecate, Mexico. Ms. Holguin's spoke briefly to Mr. Sandoval and recalled that she was wearing a witch costume when the call

came in. In addition, because trial counsel failed to investigate and speak to Ms. Holguin, they never secured the telephone toll records that would have established the date and time that Mr. Sandoval called.

(b) Annette Luna. Ms. Luna was staying at Bennie Verduzco's house the night he supposedly received a telephone call from Petitioner.

(c) Jackie Meadows. Bennie Verduzco's girlfriend, she was present when the October 31, telephone call was supposedly received from Verduzco.

(d) Mr. Sandoval told counsel about a number of individuals living and working in the Tecate area who could establish his presence there on October 30 and 31. Apparently no effort was made to locate any of these individuals.

(e) John Walters. Mr. Walters was with Petitioner in Mexico in October, 1984.

3. Counsel failed to investigate the facts and circumstances intending to establish third party culpability for the Wells shootings. These witnesses include the following:

(a) The people whose names were found in Ray Well's telephone book. Many of these people had a motive to kill Wells.

(b) Debbie Hoffman. She was approached by Ray Wells about selling drugs for him.

(c) Ray Wells' gardener. He apparently had information regarding Ray Wells' connections to an interstate narcotics trafficking ring.

(d) Kenny Rogers. This man was Ray Wells' bodyguard.

4. Petitioner was denied the effective assistance of counsel when trial counsel failed to investigate and develop the issue of petitioner's mental disabilities to be presented as evidence negating the elements of "deliberation and premeditation" required for a finding of murder in the first degree. Petitioner suffers from significant right frontal lobe brain damage resulting from the multiple head trauma. Right

frontal lobe area of the brain provides the function of impulse control, reflection, self-control, planning and volition. For years petitioner endured family environmental violence, chaos and trauma also left him with a post traumatic stress disorder. Petitioner's history of substance abuse was ample to suggest permanent brain damage from chronic substance abuse. In addition to psychological and organic disabilities he had a long history of traumatic stress resulting from his upbringing and a violence ridden milieu followed by incarceration in a dangerous and violent prison context. At the time of the Belvedere Park shootings, petitioner's state of intoxication contributed to an exaggerated the organically based mental deficiencies.

If counsel had rendered effective assistance, they would have marshaled the evidence of petitioner's long history of mental problems and presented this evidence as part of petitioner's case in chief at the guilt phase of the proceeding. Had the defense investigated and presented evidence that the petitioner lacked impulse control, the ability to reflect, the ability to maintain self-control under stressful situations, the ability to plan, then the jury would have had a basis for concluding that the Belvedere homicides were at most murders in the second degree. Trial counsel had no rational tactical reason for failing to investigate and present such evidence. The failure fell below an objective standard of reasonableness under the prevailing professional norms. But for trial counsel's failure in this regard, a reasonable probability exist that the result of the guilt phase would have been more favorable to petitioner.

Counsel before trial should have undertaken at least the following:

(a) Obtain specialist experienced in document and life history and character changes to assist counsel;

(b) Retain a licensed clinical psychologist to conduct neuropsychological testing;

(c) Retain the psychologist to study historical data, interviews, test results, and other information gathered

concerning petitioner. Under the circumstances, the jury was not given the opportunity to consider petitioner's very serious mental disorders during the guilt proceedings.

In summary, trial counsel's acts and omissions described above were not and could not have been the result of any sound strategic or tactical decisions, and Petitioner was substantially prejudiced as a result. The failure of Petitioner's trial counsel to provide effective assistance had a substantial and injurious effect or influence in determining the jury's verdict and rendered the guilt phase of Petitioner's trial unfair and the trial process unreliable. Accordingly, Petitioner's conviction must be overturned and he must be retried.

VII

THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO SEVER THE BELVEDERE PARK MURDERS FROM THE WELLS MURDERS RESULTED IN THE DEPRIVATION OF PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through VI, above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process, a fair trial, and to be free from cruel and unusual punishment in violation of petitioner's constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The court's refusal to grant petitioner's motion to sever the Belvedere Park and Wells counts resulted in effectively preventing him from testifying in his own behalf with respect to the circumstances of the Belvedere Park shootings. As stated by Circuit Judge Harrison L. Winter in **United States v. Loutz, 540 F2d at 738 (1976)**, "The only real convenience served by permitting joint trial of unrelated offenses against the wishes of the defendant is the convenience of the prosecution in securing

a conviction."

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. As noted above, Petitioner was charged in a single information with four murders, two of which occurred during a fight in Belvedere Park on October 14, 1984, and two of which occurred without apparent struggle in the victim's Baldwin Park home on October 31, 1984. Petitioner first moved to sever the Park case from the Wells case in Municipal Court on April 23, 1985. The court denied the motion as premature.

2. Petitioner again moved to sever the cases in Superior Court on October 17, 1985. The court denied the motion on December 9, 1985. The reason for the denial was stated by the court as follows:

> "Your motion is going to be denied, and I am going to make it very clear as to why I am denying it. I am denying your motion to sever based on the People's representation that they will have testimony from Benny Verduzco in accordance with that representation. But for that representation, I would grant your motion. And I will make that very clear. If the People don't have Verduzco, then you had better move to sever.. . . Because, otherwise your evidence as to the Wells shooting is too thin."

3. On September 23, 1986, the motion to sever was again considered, this time by the trial judge, Richard P. Kalustian. The court denied the motion on the basis that the Belvedere and Wells cases were "closely connected." "In theory, the prosecution theory is the killings No. 2 of the Wells occurred because of killings No. 1. I find they are cross-admissible. For that reason the motion to sever is denied."

4. The prospective prosecution informer, Bennie Verduzco, had refused to testify at the preliminary hearing. The prosecution contended in oral argument, however, that

Verduzco would testify at trial that Mr. Sandoval hid the car used in the Park offenses at Verduzco's home a few days after the shootings, that the Wells were present at that time, that the police seized the car the same day, and that Mr. Sandoval believed that the Wells had informed the police and therefore shot and killed them a week later.

5. The trial court, thus, denied Petitioner's severance motion based on the prosecution's representation that Benny Verduzco would testify regarding petitioner's motive to kill the Wells. Verduzco knew nothing, however, about the Park shootings, nor did Petitioner mention them to him; neither was there any testimony that the Wells knew that a car involved in the shootings was hidden in Verduzco's garage.

6. Petitioner filed a writ of prohibition/mandate with the California Supreme Court and requested a stay. The petition was denied and Mr. Sandoval stood trial on the joined offenses.

7. Petitioner wanted to exercise his right to testify in his own behalf in the Park cases but not in the Wells cases. Specifically, he wanted to testify regarding the circumstances that led him to be in possession of Ralph Ortega's gun, the belligerence of the decedents, the fact that one of the decedents slashed Mr. Sandoval's companion, Eugene Valenzuela, with a razor blade, the fact that one man appeared to be reaching under the backseat of the car perhaps looking for a weapon, while the other one was reaching into his pocket, and given the circumstances, Petitioner's belief that his life and that of his companions was being threatened.

8. Under the circumstances there was a substantial danger of prejudice requiring that the charges be tried separately: first, because evidence of the separate crimes would not have been cross-admissible in separate trials and the weak Wells case was joined with the relatively stronger Belvedere Park case, and second, because all four counts carried the death penalty.

9. Joinder of these two very disparate cases was unduly prejudicial because of the danger that the jurors aggregated the

evidence against Petitioner and convicted on the weak charges because of the surplus of evidence on the strong charges, or simply because of the human tendency to believe that a man who killed two people is likely to have killed two more.

10. Denial of Petitioner's motion to sever the Park case from the Wells case resulted in the infringement on Petitioner's ability to exercise his rights under the Fifth, Sixth, and Fourteenth Amendments. Unless and until Petitioner took the stand to testify, the trial court refused to rule on whether Mr. Sandoval could be cross-examined on the Wells case if he limited direct examination to the events in the Park case. This effectively restrained Mr. Sandoval from testifying regarding either case. Rather than take the substantial risk of being compelled against his will to give testimony on the Wells case, Petitioner did not take the stand. His silence on the Park case was therefore coerced, just as his testimony on the Wells case would have been coerced had he been improperly cross-examined on that subject. Had the cases been severed, Petitioner would have been free to exercise his Fifth Amendment rights to testify in one case and remain silent in the other. Depriving him of this choice deprived him of due process of law.

VIII

PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO BE TRIED BY AN IMPARTIAL JURY WHEN THE TRIAL COURT PERMITTED THE PROSECUTOR TO SYSTEMATICALLY EXERCISE HIS PEREMPTORY CHALLENGES TO EXCUSE FROM THE JURY AND THOSE WHO HAD EXPRESSED SOME RESERVATIONS ABOUT IMPOSITION OF THE DEATH PENALTY BUT WHO WERE NOT EXCLUDED FOR CAUSE.

Petitioner incorporates and realleges the allegations of all paragraphs of Claim I through VII, above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process and equal protection, to a fair trial, to fair and reliable guilt and penalty determinations, to an impartial jury, and to be free from cruel and unusual punishment because petitioner's jury was bias in favor of the death penalty, in violation of petitioner's federal constitutional rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. The prosecution admittedly used its peremptory challenges to rid the jury of those people who harbored scruples about, but were not unequivocally opposed, to the imposition of the death penalty. The prosecution used its peremptory challenges improperly by excluding Female Mexican-Americans and anyone who expressed reservations about the imposition of the death penalty. Of the twenty-one peremptory challenges used by the prosecution six were used for the explicit purpose of excluding female Mexian-Americans. Of the twelve jurors and four alternates there were no female Mexican-Americans due to the prosecution's strategy of excluding female Mexican-Americans. The prosecution also used its peremptory challenges to remove from the jury those individuals who harbored reservations about but were not unequivocally opposed to the imposition of the death penalty, thus producing a jury predisposed to impose death. During general voir dire the prosecution admitted that they were exercising their peremptory on certain jurors solely for those jurors' reservations about the imposition of the death penalty. The prosecution also admitted that since they could not dismiss the jurors during the Hovey hearing they were going to exercise their peremptories to accomplish the systematic exclusion of those opposed to the imposition of the death penalty.

2. The trial court confirmed that the prosecution was systematically exercising its peremptory challenges to excuse

prospective jurors who were less than adamant in their enthusiasm for the death penalty. Nevertheless, the trial court permitted the prosecutor to use his peremptory challenges to rid the jury of death penalty skeptics.

3. Thus, prosecution used its peremptory challenges to select a jury "uncommonly willing to condemn" Petitioner to die exactly that which is forbidden under the Constitution. Therefore, petitioner's verdict of death is therefore unconstitutional and cannot stand.

GUILT PHASE ISSUES

IX

PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL BECAUSE HIS CONVICTION IN THE WELLS CASE WAS BASED ON THE PERJURED TESTIMONY OF INFORMANT BENNY VERDUZCO.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through VIII, above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process and equal protection, to a fair trial, to a impartial jury, and to fair and reliable guilt and penalty determinations, because petitioner's conviction in the Wells case was based on the perjured testimony of informant Benny Verduzco, resulting in a violation of petitioner's federal constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. The entire Wells case against Petitioner depended on the truth of police informant Benny Verduzco's testimony. Verduzco testified that he had known Mr. Sandoval for about 16 years and that, although he had previously been a member of the Arizona Marivilla Gang, he no longer belonged. According to Verduzco, on October 15 or 16, 1984, Mr. Sandoval asked him to do a favor by keeping a car in his garage. Sandoval said

that he wanted to store the car, a brown Monte Carlo, in Verduzco's garage because, "He just said he had some kind of trouble." Verduzco asked if he could take the wheels off the car, and petitioner agreed.

Mr. Sandoval stopped at Verduzco's house again around October 24, at which time Ray and Marlene Wells were also at the house. Mr. Sandoval arrived in a red Chevy Monte Carlo belonging to Ralph Ortega and asked to borrow $5.00 from Ray Wells', then he left. The police came to Verduzco's house that night and took Sandoval's car from the garage, approximately ten hours after Ray and Marlene Wells had left.

A week later, on October 31, in the early morning hours, Verduzco testified that he was at home with his wife when the phone rang. The call came in between 1:00 and 2:00 in the morning , and Verduzco identified Mr. Sandoval's voice who said, "Benny, I just did the big mouth in." Verduzco said, "'Who,' and Mr. Sandoval said, 'Remember the one who was there in the morning with the car.'" Rather than using a name, Sandoval allegedly used the initial "R". Verduzco further attributed to petitioner the statement, "You know I take care of business. I had to do her, too." Verduzco also said that petitioner made the comment, "They have gone to heaven with the angels," and "They wouldn't be snitching no more." Verduzco did not tell the police about the phone call from Mr. Sandoval until December, 1984, at which time he claimed he was not in trouble on any cases.

2. Benny Verduzco was a three time convicted felon and heroin user who received full immunity, a reduced prison sentence, was placed in a witness protection program, received a monthly stipend, and to whose ongoing criminal conduct of burglary, car theft, and drug use the police turned a blind eye. Because of the crucial role his testimony played and the lack of reliability of his testimony, his post trial recantation of his testimony must be taken seriously. Petitioner has been sentenced to death because Benny Verduzco, in an effort to save himself, fabricated the late night telephone call. Record in the

case to date establishes Verduzco's admission and recantation. Petitioner alleges the following facts, anticipating that further investigation and discovery will elicit additional facts relevant to this claim.

(a) In March, 1992, Verduzco admitted in conversation with Attorney Debbie Ramos, that he had not received a phone call from Petitioner in which he confessed to the Wells killings. Verduzco acknowledged this fabrication in a subsequent meeting with Ms. Ramos.

(b) In a declaration dated March 1, 1993, Verduzco states:

> "Havercroft then told me all about the telephone call that I had gotten the night of the third police raid. He told details. Havercroft said that Chato had called and told me all about the shooting. Havercroft just kept asking questions and demanding that I tell him about the call. Chato was in Mexico and I was getting sicker [because of heroin withdrawal], so I just agreed to what Havercroft said. As soon as I agreed with Havercroft, he let me go. Just like that. Even though I had outstanding warrants. Like nothing."

(c) In a declaration dated November 10, 1992, Verduzco's denies that he fabricated his trial testimony. He then prepared a handwritten declaration dated December 15, 1992, stating that the November 10 document was signed because, "I was nervous because I was concerned [sic] that my me being seen [sic] going to the gang squad officer and being thought of by other inmates as a snitch by me being in that office place for too long, so I signed the declaration without reading very well just for the sake of getting out of there as soon as possible."

(d) In December, 1992, Verduzco told Ms. Ramos that he did not recall saying anything about the phone call to anyone except the police when he was suffering from withdrawals from heroin. He said that he might have said

something to Richie Moreno on the subject, but could not recall. Ms. Ramos also asked Mr. Moreno about the telephone call. He denied that Verduzco had ever told him that Petitioner had called confessing to killing the Wells. He said he had never heard anything about Petitioner phoning anyone.

(e) Verduzco also stated in his March 1, 1993, that, "the real reason that I agreed to testify in March, 1986, was because the police threatened to have me killed by putting me in the Los Angeles County Jail without protective custody after they made it look like I was an informant. The police knew about the stolen cars. They knew what would happen if they housed me in the snitch tank. And they knew that I was in fear of my life because they were threatening to keep me [in] in the County Jail on the main line. They did not do anything to correct my testimony that they knew to be wrong."

The false testimony of Benny Verduzco had a substantial and injurious effect or influence in determining the jury's verdict and rendered the guilt and penalty of Petitioner's trial unfair and unreliable. Accordingly, Petitioner's conviction and sentence must be overturned.

X

PETITIONER WAS DEPRIVED OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE HIS CONVICTION WAS BASED UPON THE IMPERMISSIBLY COERCED AND UNRELIABLE TESTIMONY OF BENNY VERDUZCO.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through IX, above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process and equal protection, to a fair trial, to a impartial jury, and to fair and reliable guilt and penalty determinations, because petitioner's conviction in the Wells case was based on the perjured testimony of informant

Benny Verduzco, resulting in a violation of petitioner's federal constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. Informer Benny Verduzco provided virtually the only evidence connecting petitioner with the Wells homicides. Verduzco testified that he received a telephone call between 1:00 and 2:00 in the morning of November 1 in which the caller, purportedly identified as petitioner, said that he had "just done the big mouth in," using the initial "R," and acknowledging that he "had to do her too" (RT 3294-3296). However, when Verduzco was rousted by the police some hours later on the morning of November 1, and informed that the Wells were dead, he appeared genuinely surprised and shocked according to the interrogating officer (RT 4318). Verduzco said nothing to the police about any telephone call until much later, after he had been taken into custody on November 27. The defense theory was that this purported telephone call was manufactured by Benny Verduzco and his brother-in-law, informer Richie Moreno, to deflect police suspicion away from them as suspects because of their prior criminal dealings with Ray Wells.

2. At trial, Verduzco testified that he "decided to testify in this case because I fear for my life," implying that he was in danger from petitioner or his confederates. He stated that the only benefits that he received in return for his testimony were the release from multiple concurrent state prison sentences some 14 months before he would normally be paroled (RT 3266), and that he was being given "room and board" in the amount of $600 a month (RT 3280) "until he gets himself a job" (RT 3410). Verduzco denied any other motive or bias to skew his testimony against petitioner or in favor of the prosecution.

3. Without the testimony of Benny Verduzco the prosecution would not have had a case against Mr. Sandoval

sufficient, even to present to the jury. Yet Verduzco was a three-time convicted felon, a heroin user, himself a suspect in the Wells murders, and a person who may have had knowledge of others, including family members implicated in the Wells murders. His credibility, bias, and incentive to manufacture the telephone call from Mr. Sandoval were, thus, crucial issues to be explored in detail by the defense at trial.

4. The prosecution engaged in a pattern of alternating coercion and benefits to Verduzco in order to insure that he would testify to the satisfaction of the prosecution. Despite this pattern, the prosecution failed to disclose the totality of their arrangements with Verduzco. Among the undisclosed benefits to Verduzco were the following:

(a) On approximately October 26 or 27, 1984, police returned to Verduzco's home several days after seizing Petitioner's brown Monte Carlo from Verduzco's garage. The police were interested in obtaining Verduzco's cooperation regarding Petitioner's whereabouts and role in the Belvedere Park shootings. When they arrived at Verduzco's house, they found a white car in the garage, recently stolen. Rather than arrest Verduzco for receiving stolen property or car theft, the police simply drove the stolen car out of Verduzco's garage and parked it around the corner.

(b) At trial Verduzco testified that he was not in trouble in any of his cases at the time he first agreed to the incriminating story of the midnight phone call. In fact, on November 27, 1984, the day he first told this story, there was an outstanding bench warrant for him recently issued on November 21, for his failure to appear in court regarding a September 21, 1984 arrest for possession of heroin and intoxicated driving. Verduzco also had an outstanding warrant in a 1983 burglary case. In spite of the existence of these warrants, Verduzco was released upon giving the police the information they wanted about the Wells shootings.

(c) By November 27, 1984, the police had investigated the stolen cars and stolen car parts found at the

Wells house at the time of the shootings, and determined that a number of them had been stolen by Verduzco. Rather than arrest Verduzco, however, they simply let him know that they knew he was guilty. As with the stolen car found at his house on approximately October 26, the police used potential charges as a continuing lever to induce his cooperation.

(d) Verduzco had five pending felonies in Los Angeles County, and was attempting to work out favorable deals. He was also refusing to testify for the prosecution in the Sandoval case, and, in fact, refused to testify at the May, 1985, preliminary hearing. In retaliation, Deputy District Attorney Horn, then assigned to the case, personally appeared for at least one of the sentencing proceedings in his pending cases and convinced the sentencing court to discard a county jail disposition, contemplate, and impose a state prison sentence instead. Toward the end of 1985, the case was reassigned to Deputy District Attorney David Milton, and the trial court demanded a statement from the prosecution as to whether Verduzco would testify at trial. This this was a factor the court viewed as crucial to the determination of petitioner's severance motion. Deputy District Attorney Milton began calling the Sierra facility where Verduzco was imprisoned leaving messages for Verduzco to call him back. This round of communications from the prosecutor's office had the effect of branding Verduzco within the prison system as an informer.

(c) The prosecutor obtained a removal order to have Verduzco brought from Sierra down to Los Angeles County Jail and arranged to have Verduzco housed in the hospital facility. This procedure is well-known as a means of providing protective custody housing to inmates such as cooperating witnesses and the relatives of police officers. Verduzco continued to resist law enforcement overtures to testify. After Verduzco had been in county jail long enough to be clearly identified as an informer because of where he was being housed, i.e., after Verduzco had obtained a "snitch jacket," the prosecutor told him that unless he testified he would be put on

the mainline in county jail and never go back to Sierra. Verduzco was repeatedly brought to the watch commander's office, another signal to inmates that Verduzco was an informer. Verduzco finally agreed to testify only because, having been identified as an informer against his will, he could assure his own safety in jail only by becoming an informer.

(d) Thereafter, District Attorney Milton arranged to have Verduzco's sentence recalled from the Department of Corrections and on November 1, 1986, Verduzco was released with a promise that, after his testimony his sentences would be commuted to time served.

(e) Also undisclosed to the defense or the jury was the fact that, on the date of Verduzco's release, investigating homicide detective Miriam Travis obtained a $1,500 cash payment from the Witness Protection fund for Verduzco. The police and the prosecutor well knew how that money would be spent, since Verduzco was a longstanding heroin addict who had supported his habit for many years by stealing cars and committing burglaries.

(f) From November 1, 1986 through the time of his testimony, Verduzco supported himself by stealing, and was picked up on multiple occasions by East Los Angeles police officers regarding these offenses. He obtained his release without arrest each time by asking the arresting or detaining officer to call sheriff's detectives West or Travis to confirm that he was a prosecution witness in a death penalty case. Verduzco was never arrested or prosecuted for these offenses.

(g) On February 27, 1987, after the guilt verdicts had been returned, but before penalty trial, Verduzco committed another burglary in East Los Angeles and was caught by the homeowner. Verduzco managed to escape after a scuffle. On March 1, the homeowner made a positive identification of Verduzco from a photo line-up. The police, however, failed to locate and arrest him on this charge for more than a month,--until after the penalty trial had been completed and the death verdict returned,--to avoid impeachment of his testimony in this

case.

5. Had the jury been informed of the inducements offered, benefits conferred, and coercion administered to Verduzco, as well as other relevant information relating to Verduzco's credibility, a verdict of "not guilty" to the charge of first degree murder on the Wells cases, a finding of "not true" on the special circumstances, and a sentence other than death would almost certainly have been returned by the jury.

This error had a substantial and injurious effect or influence in determining the jury's verdict and rendered the guilt and penalty phase of Petitioner's trial unfair and unreliable. Accordingly, Petitioner's conviction and sentence must be overturned.

XI

PETITIONER WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE TRIAL COURT'S FAILURE TO PERFORM ITS DUTY TO EXCLUDE EVIDENCE OF BENNY VERDUZCO'S NOVEMBER/DECEMBER, 1984 STATEMENTS AND TRIAL TESTIMONY AS INVOLUNTARY

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through X, above.

Petitioner's convictions and sentence were rendered in violation of his rights to due process, to a fair trial, to the effective assistance of counsel, to cross-examine and confront the witnesses against him, to reliable and accurate guilt and penalty determinations, and to be free from cruel and unusual punishment, because the trial court failed to exclude evidence of involuntary statements by witness Benny Verduzco.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

As described above, law enforcement officers engaged in a concerted effort to compel Benny Verduzco to testify in a

manner that implicated Petitioner in the Wells shootings. This compulsion included the following:

1. On October 26 or 27, 1984, the police found a stolen car in Verduzco's garage. They simply took possession of the car and did not arrest Verduzco.

2. When the police did arrest Verduzco on November 27, 1984, they knew he had stolen a number of cars and car parts found at the Wells residence. Again, however, they did not arrest Verduzco on these charges. Instead, as with the previous incident, they simply made sure Verduzco was aware that the authorities knew of his involvement.

3. At the time of the November 27 statement implicating Petitioner, Verduzco had three pending cases and was suffering heroin withdrawal.

4. The idea of the late night telephone call was initiated by Sheriff's Deputy Havercroft. As soon as Verduzco agreed with Havercroft's version of that call, the officer let him go.

5. Sheriff's deputies threatened to arrest Verduzco's girlfriend, Jackie Meadows, if Verduzco did not cooperate with the authorities.

6. Verduzco was arrested in January, 1985, and released on bail February 11. During this time police started pressuring Verduzco to testify against Petitioner. He was followed and arrested again in late March, on April 2, 1985, and again on April 4, 1985.

7. On September 23, 1985, Verduzco was sentenced to three years in state prison on various charges. While in custody in Los Angeles County Jail, awaiting commitment to state prison, he was housed in the "snitch tank" and marked as an informant. He had, at this point, still refused to testify in Petitioner's trial.

8. After being sent to state prison, the district attorney began calling the prison and leaving messages for Verduzco. When inmates found out about the messages, Verduzco again was labeled an informant.

9. In January, 1986, Verduzco was transported to Los Angeles County Jail where he was required to meet with the Deputy District Attorney in the Watch Commander's Office where the inmates would be aware of the meeting. Verduzco was offered release from prison on all cases and admittance to the witness protection program.

10. In February or March, 1986, Verduzco was again taken to County Jail where he was placed in the hospital section, a located where inmates especially at risk in the general prison population are housed. There, sheriff's deputies told Verduzco that he would be kept in Los Angeles County Jail if he refused to testify and that he would taken out of protective custody and placed on the "mainline." Since Verduzco had a "snitch jacket" he believed he would be killed by other inmates if he was out among the general prison population.

11. The manipulation of the penal system by the prosecution, sheriffs deputies and prison authorities put maximum pressure on Benny Verduzco to testify favorably for the People undoubtedly affecting the substance of Verduzco's testimony. As described above, his post-trial explanations of what occurred differ markedly from the trial testimony; and each version changes depending on who is asking the questions. The likelihood that Verduzco would lie to help himself is high. To base a first degree murder conviction and sentence of death on this person's testimony is a tragedy.

This error had a substantial and injurious effect or influence on the verdict, rendered the trial and guilty and penalty judgments fundamentally unfair, and resulted in a miscarriage of justice.

XII

THE TRIAL COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS BY ALLOWING THE PROSECUTOR TO REPEATEDLY PUT IRRELEVANT EVIDENCE OF PETITIONER'S GANG AFFILIATION BEFORE THE JURY.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XI, above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process, to a fair trial, to a fair, reliable, individualized, and non-arbitrary sentencing determination, and to freedom of association under the First and Fourteenth Amendments when the prosecution impermissibly made prohibited references to petitioner's gang affiliation.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. Prior to opening statements, Petitioner's counsel moved to preclude the prosecutor from referring to Mr. Sandoval's alleged gang membership. The prosecutor responded that "evidence of gang membership was relevant to prove motive for the Belvedere Park shootings." The trial court denied Petitioner's motion; and, in his opening, statement the prosecutor referred explicitly to "defendant's gang" and made other references to gang affiliation, including referring to his "street name" and his "home boys."

2. During prosecution's case, the prosecutor elicited from witnesses Carlos Tostado and Benny Verduzco their alleged gang affiliation and that of Mr. Sandoval. This was despite Petitioner's repeated objections and motions to strike the testimony. The testimony failed to establish any connection between gang membership and the confrontation at the park.

3. The trial court ruled that "gang membership alone" was not causing any "undue spill over onto" Petitioner. On the contrary, this testimony was highly prejudicial. Despite the lack of relevance to any material issue in the case, the testimony suggested to the jury that Petitioner should be found guilty of murder because of his gang affiliation, since gang members are known to be more violent and more likely to seek revenge. This evidence undermined both Petitioner's self-defense contention in the Park case and his denial of culpability in the Wells case.

4. The misconduct, thus, began with the prosecutor's opening statement at the guilt phase, continued throughout the guilt and penalty phases, and ended with his closing argument at the penalty phase. These repeated references to petitioner's alleged gang membership so infected petitioner's trial that he was denied due process and a fair trial. Moreover, the prosecutor's constant references to information specifically excluded by the trial court and irrelevant was highly inflammatory. Petitioner's First Amendment rights to freedom of association and his Eighth Amendment rights to an individualized penalty determination, not one based on the obvious negative and prejudicial inferences to be drawn from his alleged gang affiliation, were violated.

5. The trial court's error had a substantial and injurious effect or influence in determining the jury's verdict and rendered the guilt and penalty phase of Petitioner's trial unfair and unreliable. Accordingly, Petitioner's conviction and sentence must be overturned.

XIII

PETITIONER WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL AND THE RIGHT TO DUE PROCESS OF LAW WHEN THE TRIAL COURT ERRONEOUSLY ADMITTED EVIDENCE OF GANG ACTIVITIES AT THE GUILT PHASE WHICH PREJUDICING THE PENALTY DETERMINATION.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XIII, above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process, to a fair trial, to a fair, reliable, individualized, and non-arbitrary sentencing determination, and to freedom of association under the First and Fourteenth Amendments in that the prosecution impermissibly made prohibited references to petitioner's gang affiliation.

The facts supporting this claim, among others to be

presented after full investigation, research, analysis, discovery and hearing, include the following:

1. Petitioner alleged above that the erroneous admission of evidence of petitioner's gang affiliation prejudiced him with respect to the murder convictions. The prejudice was drastically increased with respect to the penalty phase. When evidence of the defendant's gang affiliation is supplemented with inflammatory evidence of the gang's violent criminal activities, it is "catastrophically prejudicial" to the defendant (**In re Wing y., 67 Cal.App.3d at 76**). This is precisely what happened to petitioner at penalty phase.

2. The prosecution's campaign in the guilt phase, to connect petitioner to the Arizona Marivilla, gang compelled petitioner to attempt to blunt the impact of this evidence at the penalty phase. He therefore presented the testimony of Richard Rodriguez, a gang consultant and contractor with the California Youth Authority. Rodriguez testified that Arizona Marivilla, although once a street gang, had incorporated as a neighborhood association in 1982 and dedicated itself to recreational and community services (RT 6123; 6125). Rodriguez also testified that after petitioner left prison in 1984 he was not involved in gang activities. On the contrary he worked trying to keep youth out of gangs (RT 6129-6131; 6133; 6136).

3. On cross-examination, the prosecutor asked Rodriguez, "[I]sn't it true that Arizona Marivilla was the most violent gang in East Los Angeles?" and "Wasn't it responsible for the most murders back in '75 and '85 [than] any other gangs in East Los Angeles?" (RT 6135). Although Rodriguez had stated that since 1976 the Arizona Marivilla association had tried to stop gang violence, the prosecutor repeated, "But of course you knew, of course they have done numerous murders since that time, right?" When Rodriguez denied knowledge of this, the prosecutor asked, "Wasn't the defendant one of the most active members in Arizona Marivilla?" Again Rodriguez denied the insinuation (RT 6137). The prosecutor persisted in his attempt to portray the Arizona Marivilla as the most vicious

and murderous of street gangs. Despite Rodriguez' disavowals, the prosecutor repeatedly asked whether Arizona "killed many people of Lote and other gangs," whether Arizona committed "a lot of murders," whether Arizona "kill[ed] a whole bunch of people," and whether "it was responsible for a lot of murders."

4. In closing argument, the prosecutor told the jury that Rodriguez' testimony about Arizona Marivilla, as a neighborhood association "that does barbeques and picnics in East Los Angeles is just not true." He again referred to what he considered Arizona's real criminal activities (RT 6532).

5. Thus, the prosecutor completed at penalty phase the strategy he had begun at guilt phase: to connect petitioner with the street gang Arizona Marivilla, and to then show that the Arizona gang was involved in savage criminal acts. From this totally improper evidentiary base, the prosecutor urged the jury to conclude that petitioner himself was an "executioner" and a "cold-blooded killer" who deserved to die.

This error had a substantial and injurious effect or influence in determining the jury's verdict and rendered the penalty phase of Petitioner's trial unfair and unreliable. Accordingly, Petitioner sentence must be overturned.

XIV

PETITIONER WAS DENIED DUE PROCESS AND A FAIR TRIAL BY THE PROSECUTION'S FAILURE TO DISCLOSE THREATS INFLICTED AND BENEFITS CONFERRED ON INFORMER CARLOS TOSTADO IN RETURN FOR HIS TESTIMONY.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XIII, above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process, to a fair trial, to the effective assistance of counsel, to cross-examine and confront the witnesses against him, to reliable and accurate guilt and

penalty determinations, and to be free from cruel and unusual punishment because the prosecution improperly failed to disclose material evidence, in violation of petitioner's federal constitutional rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. The Supreme Court held in **Brady v. Maryland, 373 U.S. 83, 387 (1963),** "[t]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." For the purposes of the prosecution's compliance with its Brady obligation, there is no constitutional distinction between impeachment and exculpatory evidence. Consequently the disclosure obligation includes production of impeachment evidence.

2. The record to date establishes that a key informant, whose testimony the prosecution offered with respect to the Belvedere Park shootings, received benefits from the prosecution not revealed to trial counsel. Petitioner also believes there may very well have been additional benefits not heretofore disclosed by the prosecution and law enforcement agencies. It is anticipated that additional investigation and discovery will lead to additional admissible evidence showing the unreliability of Carlos Tostado's trial testimony.

3. Carlos Tostado was the principal prosecution witness regarding the Belvedere Park shootings. He gave very damaging testimony undermining petitioner's contention of self-defense/unreasonable self-defense. Tostado's credibility was essential to the prosecution's case. He testified that he had been a friend of Mr. Sandoval and a member of the same gang. Along with a group of young men and girls, he went into the park and later returned to the car. He saw four girls and three guys near a Ford Granada. He got into a fight with one of the

guys in the group. Eventually the fight was broken up. Tostado also had been in two fights earlier in the evening. As everyone was getting ready to leave, a light brown Monte Carlo drove up and Alfred Sandoval and Eugene Valenzuela got out. According to Tostado, Mr. Sandoval grabbed one of the guys by the neck, pulled him close and shot him in the head. Mr. Sandoval then grabbed another man standing nearby and shot him in the head as well. The two men then left and no other shots were fired.

4. Tostado testified that he was not particularly beholden to the prosecution, that he was not being paid for his testimony, and that the only arguable benefit he had received was money for hotel accommodations for himself and his wife while he testified at trial.

5. In fact, the record revealed during the course of the investigation of the Los Angeles jailhouse informer scandal demonstrates that Tostado received a cash payment of $3,000, several months before trial, from the investigating officer, Miriam Travis, a Los Angeles sheriff's detective. Tostado failed to acknowledge this payment in his testimony before the jury and the prosecution failed to disclose it. To compound the magnitude of the violation, the record on appeal reflects that the prosecuting attorney, David Milton, and investigating detectives Travis and West had specifically and personally made representations to defense counsel as of July 7, 1986, some four months before trial, that "no monies of any kind had been given to any of the above-named witnesses [Verduzco, Montenegro, and Tostado]" (CT 604-605). In fact, the date of disbursement of Tostado's $3,000 cash payment was January 16, 1986, some six months before these unequivocal law enforcement representations that no money had been paid.

6. Moreover, as with informer Verduzco, there are apparently no existing records of any of the other payments which made to Tostado, including the hotel allowance acknowledged at trial. Petitioner's repeated and extensive Public Records Act requests have yielded a wealth of

documentary materials about informers in this case who did not testify at trial, e.g., Louis Montenegro, but nothing whatsoever memorializing any arrangement with or payment to Verduzco or Tostado, the two principal prosecution witnesses at trial.

7. In addition to the undisclosed benefits conferred on Tostado, there were extensive threats made to Tostado by Los Angeles law enforcement agents to coerce him to incriminate petitioner. While being held in Los Angeles County Jail, sheriff's deputies falsely told Tostado that petitioner was preparing an attempt on his (Tostado's) life, and that Tostado's only hope of survival was to turn state's evidence and testify against petitioner regarding the Belvedere Park shootings. Tostado capitulated to this pressure, but none of it was disclosed at trial.

8. As with informer Verduzco, the jury was presented with a thoroughly skewed picture of Tostado's relationship with law enforcement. The coercive conduct inflicted on Tostado to get him to testify was not revealed, and the substantial cash payments to him were similarly hidden. Tostado realized law enforcement had simultaneous power to make his life wholly miserable by rousting him or jeopardizing his safety with an implication that he was an informer, as well as to provide substantial and otherwise unattainable benefits. The defense should have been able to show that $3,000 to a low-life drug addict was akin to winning the lottery, and was extremely likely to engender a compelling pro-prosecution bias. Disclosure of the actual law enforcement treatment of Tostado would have given the defense a basis to demonstrate that Tostado's testimony became systematically more prosecution-prone and biased against the defense through trial, culminating in Tostado's revelation for the first time a week or two before trial that petitioner had grabbed each of the decedents in a headlock and shot them from a position of total control.

This error had a substantial and injurious effect or influence in determining the jury's verdict and rendered the guilt and penalty phase of Petitioner's unfair and unreliable.

Accordingly, Petitioner's conviction and sentence must be overturned.

XV

THE PROSECUTOR DEPRIVED PETITIONER OF DUE PROCESS AND A FAIR TRIAL BY KNOWINGLY PRESENTING FALSE AND MISLEADING TESTIMONY TO THE JURY AND ARGUING THE TRUTH OF THAT TESTIMONY.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XIV above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process, to a fair trial, to the effective assistance of counsel, to cross-examine and confront the witnesses against him, to reliable and accurate guilt and penalty determinations, and to be free from cruel and unusual punishment because the prosecution improperly failed to disclose material evidence, in violation of petitioner's federal constitutional rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. Benny Verduzco testified that he saw petitioner in a '69 black Chevy Impala on one occasion, October 15 or 16, 1984, when petitioner dropped off the Monte Carlo for storage at Verduzco's garage. This was important testimony for the prosecution because it connected petitioner to the same type of car seen by Frank Bender, the neighbor of the Wells, who identified that type of car leaving the scene after the shots of the night of the Wells murders.

2. The prosecutor asked Verduzco repeatedly whether he had seen petitioner with that car on other occasions. Each time Verduzco answered no. This testimony was false, and the prosecutor should have corrected it immediately. In fact,

Verduzco had stolen that car from Griffith Park earlier in the month. And, he was present after the theft when the vehicle identification tags were changed. Had the prosecutor corrected this testimony it would have revealed yet another auto theft by Verduzco for which he was not being prosecuted. Verduzco was asked on cross-examination by defense counsel whether he had stolen the car, and Verduzco repeated his denial.

3. At one point the prosecutor asked Verduzco, "How did you get out of prison?" Verduzco answered, "I decided to testify on this case because I fear for my life." Over a defense motion to strike, the court let the answer stand. The prosecutor argued that the jury should know that Verduzco's testimony was motivated by a desire for his own safety rather than the prosecution's agreement to release him from custody. Verduzco's answer, however, failed to correctly reflect reality. Rather than concern about retaliation in state prison if he did testify, Verduzco was really afraid of being turned loose on the mainline at County Jail with a "snitch jacket," created by the prosecution, if he did not testify. The prosecutor intentionally suppressed its own role in compelling Verduzco to testify favorably.

4. In questioning Verduzco about the November 27 and December 10, 1984, statements to the police about the purported telephone call from Petitioner, the prosecutor asked Verduzco, "At the time you gave the statement in December, 1984, about the telephone call, you weren't in trouble on any cases, were you?" Verduzco answered, "No I wasn't." This answer suggested to the jury that Verduzco did not have any motive to tell the interrogating officers what they wanted to hear. In fact, Verduzco's testimony was patently false. The prosecutor would have known that just a week or so before making that statement Verduzco had failed to appear for a November 21, 1984, court hearing relating to possession of heroin. A bench warrant had been issued for failure to appear and was outstanding until April 25, 1985. There was also another warrant outstanding for him in a prior burglary. Thus,

when Verduzco was questioned on November 27 and December 10, 1984, he should have been arrested by law enforcement officers on these warrants. Indeed, Verduzco was surprised that he was not arrested. In fact, his freedom was the price of his cooperation with the investigation of Petitioner. The investigating officers could have placed him in custody at any time. Thus, the prosecutor knowingly permitted false testimony which of bolstered Verduzco's credibility to the jury.

5. Verduzco testified that he was not arrested in spite of his four pending felony cases because "there was a mixup in the files. They had arrested my brother for my cases and when they let him go, they didn't put the file back in the computer, so I was clear." That was not true and both Verduzco and the prosecutor knew it. In fact, the bench warrant issued for Verduzco on November 21, 1984, was pending without interruption through April 25, 1985. Had the prosecutor presented the true facts regarding Verduzco's warrant status, the jury would have had a very different view of his credibility. Between November 1, 1984, when Verduzco appeared "shocked" at hearing of the Wells shooting, and November 27, 1984, when Verduzco first acknowledged the telephone call, the bench warrant was issued for the failure to appear on September 21. Thus, Verduzco was now much more vulnerable to police coercion. The prosecution, however, permitted Verduzco to deny this crucial element of bias.

The prosecutor, as an officer of the court, was duty bound to correct Verduzco's false testimony. His failure to do so had a substantial and injurious effect or influence in determining the jury's verdict and rendered the guilt and penalty phases of Petitioner's trial unfair and the trial process unreliable. Accordingly, Petitioner's conviction and sentence must be overturned and they must be retried.

XVI

TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT ANY MENTAL STATE DEFENSE AT THE GUILT PHASE OF

TRIAL DEPRIVED PETITIONER OF EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XV, above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process and equal protection, to a fair trial, to the effective assistance of counsel, and to fair and reliable guilt and penalty determination because trial counsel's representation was ineffective at the guilt phase of trial, in violation of petitioner's federal constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. Trial counsel failed to conduct an adequate investigation into petitioner's background in order to determine whether any viable mental state defenses existed which could and should have been presented at the guilt phase of the trial. Trial counsel either failed to obtain, or failed to review petitioner's school, medical, jail, prison, counseling, and court records. These records would have alerted competent counsel that there were viable mental defenses which should have been investigated and presented at the guilt phase of petitioner's capital trial.

2. Trial counsel failed to contact witnesses who could have supported and amplified upon the information contained in the records described above, and provided counsel with facts which further supported the existence of guilt phase mental defenses. Trial counsel failed to investigate the facts and witnesses and failed to consult with experts about these facts and witnesses in order to confirm the existence of guilt phase mental defenses which could and should have been asserted on petitioner's behalf.

3. Petitioner suffers from significant right frontal lobe

brain damage resulting from multiple closed head trauma suffered at the hands of his abusive parents (and then, following his father's death when Petitioner was young child, at the hands of his mother's boyfriend). The history includes at least fourteen head blows resulting in loss of consciousness. Additional head injury was suffered in a car accident when Petitioner was an adult. The right frontal lobe area of the brain controls the functions of impulse control, reflection, self-control, planning and volition.

4. Chaos and trauma in the years that petitioner endured family and environmental violence also left him with a post traumatic stress disorder. Further, from the time his mother introduced him to alcohol at the age of six or seven, petitioner developed an ever increasing addiction to alcohol as well as drugs, including heroin, amphetamines, cocaine, and hallucinogens. Petitioner's history of substance abuse, spanning a period almost as long as the history of physical injury, was ample to suggest permanent brain injury from chronic substance abuse.

5. In addition to physiological and organic disabilities, petitioner had a long history of traumatic stress resulting from his upbringing in a violence-ridden gang milieu followed by incarceration in an even more dangerous and violent prison context. Finally, counsel was aware of petitioner's state of intoxication on the evening of the Belvedere Park shootings, a condition well recognized as activating or exaggerating organically based mental difficulties.

6. Petitioner informed counsel prior to trial that he suffered from black-outs which should have alerted counsel to the possibility of brain injury. Inquiry into the medical history of Petitioner's family would have revealed a pattern of epilepsy as well.

7. Had trial counsel been alert to any of these facts and conducted a mental state examination prior to guilt trial, at least three separate bases of support for imperfect self-defense/defense of others could have been developed: 1)

Petitioner suffered at the time and continues to suffer from organic brain damage; 2) Petitioner suffered from a traumatic stress disorder as a result of the violent and dangerous environments in which he has been raised, resulting in a hypersensitivity to threatening situations and reflex-like overreaction to perceived threats; and 3) Petitioner suffers from a personality disorder resulting from the brutalization inflicted on him as a child, which renders him extremely volatile in times of stress and unable to accurately assess the conduct of others.

8. In sum, trial counsel would have discovered a substantial amount of medical, psychological and psychiatric evidence that petitioner is unusually susceptible to honest, albeit unreasonable, overreaction in the belief that he needs to defend himself from precisely the type of situation which occurred in Belvedere Park. Such a defense would have strengthened the defense presentation, withstood and precluded various prosecution attacks on the defense of imperfect self-defense, and made it highly probable that the jurors would have returned more favorable verdicts in the Belvedere Park case. Such evidence, if properly investigated, prepared and presented by competent experts at trial, would have gone directly to the issue of premeditation and deliberation. Had the evidence been properly developed and presented, it is probable the jury would have decided this mental state issue favorably to petitioner.

9. Further, trial counsels' failure to present the foregoing evidence during the penalty phase rendered the death verdict unreliable because the jury was not given the opportunity to consider petitioner's grave mental disorders in the penalty proceedings. Evidence of, inter alia, the existence of post traumatic stress disorder, petitioner's brain damage, and substance addiction would have been highly material to the jury's penalty deliberations under several sentencing factors, including extreme mental or emotional disturbance and any other mitigating circumstances. If the jury had known this information, it is probable that its verdict would have been favorable to petitioner.

Trial counsel's failure to consider and present any mental state defenses to the Belvedere Park shootings were not and could not have been the result of any sound strategic or tactical decisions, and Petitioner was substantially prejudiced as a result. The failure of Petitioner's trial counsel to provide effective assistance in this regard had a substantial and injurious effect or influence in determining the jury's verdict and rendered the guilt and penalty phases of Petitioner's trial unfair and the trial process unreliable. Accordingly, Petitioner's conviction and sentence must be overturned and he must be retried.

XVII

THE TRIAL COURT'S REFUSAL TO RULE ON THE SCOPE OF PERMISSIBLE CROSS-EXAMINATION, IF PETITIONER TOOK THE STAND TO TESTIFY ON THE BELVEDERE PARK CASE, VIOLATED PETITIONER'S FIFTH AMENDMENT RIGHT TO TESTIFY ON HIS OWN BEHALF.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XVI, above.

Petitioner's sentences were rendered in violation of his rights to due process, to a fair trial, and to fair and reliable penalty determinations because the trial court refused to rule on the scope of permissible cross-examination if petitioner testified in the Belvedere case, violating petitioner's right to testify on his own behalf by effectively coercing his silence. These actions violated petitioner's federal constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. Petitioner advised the trial court prior to trial of the possibility that he would seek to testify in one, but not both, of

the cases with which he was charged. At the close of the defense presentation at trial, petitioner again announced his intention of testifying only with respect to the Park case, and requested that the trial court rule on the scope of cross-examination which would be allowed the prosecution. At the court's request, petitioner made an offer of proof as to his proposed testimony by stating that he would testify to the events of October 13-14 and would claim self-defense, but that he would not testify at all with respect to his activities on October 31, the date on which the Wells were killed. The trial court refused to rule prospectively as to the proper limits of cross-examination of petitioner were he to testify only to the events of October 13-14, declaring that "whether a defendant can effectively limit the cross-examination depends upon the direct examination and may not be known until he testifies." Petitioner therefore did not take the stand.

2. The trial court's refusal to issue a prospective ruling on the proper scope of cross-examination prevented Petitioner from exercising his federal constitutional right to testify on his own behalf with respect to the Park case. In effect, the trial court's refusal coerced Petitioner's silence. Petitioner did not dispute the fact that he shot the two victims at Belvedere Park. However, he intended to testify that these actions were taken in self-defense. Testimony from the defendant himself is essential in a self-defense case. Here, no other witness could have provided the testimony regarding the reason Petitioner had possession of a gun in the first place, his presence at Belvedere Park, the belligerence of the victims, the confrontation between Pelon and the victims, the fact of Pelon having been slashed with a box cutter by one of the assailants, the fact that one man was reaching behind the seat of his car while the other reached into the pocket of his jacket. Obviously, only Petitioner could testify about the fear for his life. Without the testimony of Mr. Sandoval himself, the jury was presented with a one-sided and distorted picture of events.

3. The evidence on the Wells case was much weaker

than that on the Park case. The prosecution's strategy was to bolster the relatively weak Wells case by connecting it to the Park case. Thus, in closing argument, the prosecutor urged the jurors to find Petitioner guilty in the Wells case because the "M.O." of that case was similar to that of the Park case.

4. By contrast, if petitioner's testimony had convinced the jury that he fired in self-defense at Belvedere Park, rather than in the deliberate manner portrayed by the prosecution, the prosecution portrayal of Petitioner as the Wells killer certainly would have been less compelling.

The trial court's error had a substantial and injurious effect or influence in determining the jury's verdict and rendered the guilt and penalty phase of Petitioner's trial unfair and unreliable. According, Petitioner's conviction and sentence must be overturned.

XVIII

PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE WELLS CASE BY THE FAILURE OF TRIAL COUNSEL TO PRESENT AVAILABLE EVIDENCE THAT SOMEONE OTHER THAN PETITIONER COMMITTED THE CRIME

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XVII above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process and equal protection, to a fair trial, to the effective assistance of counsel, and to fair and reliable guilt and penalty determinations because trial counsel's representation was ineffective at the guilt phase of trial. Counsel failed to introduce readily available evidence that suggested someone other than petitioner committed the crime. This omission violated petitioner's federal constitutional rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among others to be

presented after full investigation, research, analysis, discovery and hearing, include the following:

1. Petitioner denies any involvement in the Wells murders. Petitioner believes that proper investigation would reveal admissible evidence of third party culpability showing, not only the possibility that others had a motive to kill Ray Wells, but that evidence exists linking third parties to the actual killings. Unfortunately, Petitioner's trial counsel failed to adequately investigate and marshal the evidence to present this defense to the jury. The information available in the record is summarized briefly below. It is anticipated that further investigation and discovery will reveal additional facts supporting this crucial defense to the Wells murders.

2. At trial, counsel for petitioner unsuccessfully sought to introduce evidence that someone other than petitioner was likely responsible for killing Ray Wells, based on three factors: 1) Wells was a cocaine dealer who, because he was aware of the dangers of his trade, kept an arsenal of weapons to protect himself from the pervasive robberies, rip-offs, and retaliations; 2) Wells was also involved in buying and selling stolen cars and car parts, and owed criminal associates substantial sums of money; and 3) Wells had a very unusual life insurance policy which gave a number of shadowy characters a motive for murder. The trial court excluded all of this evidence on the basis that it did not focus on a specific person with a particular motive and opportunity to commit the murder.

3. The defense promised this evidence to the jury in opening statement:

> "With respect to the Wells situation, the defense will prove to you that Mr. Ray Wells was a known dealer in cocaine, that many people had a motive to kill Mr. Wells, including some connections that he had who had not been paid off in some recent drug deals.
>
> "We will prove to you that at the time of his

death when the police arrived to search the Wells home, they found not one gun, not two guns, not three guns, but four guns in Mr. Wells' home.

"We will prove to you the witnesses have seen Mr. Wells in the past with a gun strapped to his ankle for protection.

"We will prove to you that Mr. Wells was also in the stolen car business, stolen parts, stolen engines. That at the time of his death when the police took the inventory of the property in his home, there were seven stolen car engines and major parts to automobiles in his garage and on his property." (RT 2350-2351.)

4. After the opening statement, the trial court excluded all such evidence. In closing argument the prosecutor chided defense counsel for promising evidence which it could not produce. This, in itself, substantially prejudiced petitioner with respect to the Wells and Belvedere Park shootings because of the inevitably adverse effect on the jury of unfulfilled defense promises.

5. The defense could have presented evidence which met all requirements for admissibility based on the following information which the prosecution provided to the defense. On November 5, 1984, just five days after the Wells shootings, Frank Montes, a local auto repair operator who had repaired Ray Wells' limousines, stated that, shortly before the shootings, a large-scale cocaine dealer named Fernando Ortiz told him that Wells had become involved in cocaine trafficking, that Wells "was in too deep and over his head," and that Wells had accepted cocaine and then "burned" either Ortiz, or Ortiz' cocaine connection. Montes, also stated that Fernando Ortiz had a separate source of contention with Wells relating to Wells' employment of petitioner to collect debts for him. Finally, Montes told police that Fernando Ortiz believed that

Ray was going to move away from the area without settling his accounts with Ortiz.

6. Trial counsel could have presented Montes' testimony tending to show that it was Fernando Ortiz acting alone or in connection with his cocaine connection, who killed Wells in retaliation for the drug burn. The defense could have presented evidence that according to the code of the jungle of cocaine traffickers, it was understood to be common practice that cocaine suppliers who fronted cocaine to a seller, but who were not paid, had to either extract the money or kill the delinquent seller in order to maintain credibility in the narcotics trafficking community.

7. This evidence would have met the applicable legal test for third party culpability because 1) it identifies a specific person or persons; 2) it gives a motive well-recognized to be the cause of scores of homicides; and 3) Ortiz had the opportunity to commit the killing in the manner in which it occurred because of his access to the Wells house. Fernando Ortiz himself told the police that he was a friend of Ray's and that "he and his brother [Sergio Ortiz] would go over to Ray's house, sometimes they would use the back gate, other times jump over the side chain-link fence," just as described by a neighbor, Frank Bender, who saw the Hispanic male enter and leave the Wells premises at the time of the shooting. Of particular interest in the police interview with Fernando Ortiz, conducted on November 14, more than a week after the interview with Frank Montes, is that the investigating officers apparently accepted at face value Ortiz' statement "that he never heard anyone talk about being mad at Ray" and that "he did not know if Ray was dealing cocaine."

8. Thus, the defense could have presented evidence that not only was there a specific third party with far more motive and opportunity to kill the Wells than petitioner, but that the investigating law enforcement officers brushed this alternative suspect off without any serious investigation apparently because of an exclusive commitment to amassing evidence against

petitioner, rather than finding the actual killer.

9. Petitioner alleges that the defense could have presented further evidence in support of this third party culpability defense, to wit, that the principal investigating officer in the case, sheriff's detective Woodrow West, had a vendetta against petitioner dating from the mid-seventies. He had publicly stated over the years that he was going to get petitioner locked away forever at some point in his law enforcement career. The origins of this vendetta were numerous street encounters between petitioner and Detective West over the years; Detective West's belief that petitioner tried to kill a colleague of West's in the 1978 incident for which petitioner was convicted of brandishing a weapon; and a personal animus developed by West toward petitioner over the years. This animus translated into a subversion of even-handed law enforcement in November and December, 1986 when West focussed on building a case against petitioner for the Wells killings, in addition to the Belvedere Park killings, to the disregard of other equally or more likely culpable suspects. Had such a focussed and specific third party culpability defense been presented, together with a reasonable explanation for the mistaken prosecution of petitioner, it is highly unlikely that the jury would have convicted petitioner in the Wells case.

This error had a substantial and injurious effect or influence in determining the jury's verdict and rendered the guilt and penalty phase of Petitioner's unfair and unreliable. Accordingly, Petitioner's conviction and sentence must be overturned.

XIX

PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PROSECUTOR COMMITTED MULTIPLE INSTANCES OF MISCONDUCT IN HIS IMPROPER CROSS-EXAMINATION OF

THE CRUCIAL ALIBI WITNESS IN THE WELLS CASE.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XVIII, above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process and equal protection, to a fair trial, and to fair and reliable guilt and penalty determinations because of numerous instances of prosecutorial misconduct at the guilt phase of petitioner's trial during cross-examining of the crucial alibi witness in the Wells case, in violation of petitioner's federal constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteen Amendments to the United States Constitution.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

Ralph Ortega testified that he went to a small ranch in Mexico with petitioner on October 24. After four days, Ortega returned to Los Angeles but that petitioner stayed; petitioner was still there when Ortega returned around midnight on October 30. He and Petitioner stayed on the ranch and went trick or treating with Ortega's son the following night, Halloween. (RT 4414-4428). Ortega was the principal defense witness on the Wells case and testified in direct contravention of Verduzco that petitioner was not in Los Angeles a week before the shootings, and that petitioner was not in Los Angeles in the early morning hours of October when the Wells were shot.

The improper cross-examination of Mr. Ortega included the following:

1. The prosecutor insisted repeatedly that Ortega had conspired with defense counsel to mislead and lie to the jury. Such unsupported accusations that defense counsel fabricated evidence deprived Petitioner of a fair trial. And, to personally insist that a witness is lying is misconduct because in implies

to the jury that the prosecutor has additional evidence beyond that admitted at trial.

2. The prosecutor used the forum of cross-examination to present to the jury his personal opinion that defense counsel and the defense witnesses had fabricated evidence.

3. The prosecutor elicited from Mr. Ortega an exchange that occurred herein the prosecutor, Ortega, and defense counsel outside the courtroom. Over defense counsel's objection the prosecutor misstated and mischaracterized defense counsel's comments.

4. The prosecutor repeatedly asked questions harmful to Petitioner without a good faith belief that the questions would be answered in the affirmative or with the belief that the facts could be proved if their existence should be denied. Such questions suggested to the jury that the prosecutor has a source of information unknown to them which corroborates the truth of the matters in question. With respect to the colloquy outside the courtroom, the prosecutor suggested that defense counsel made a remark indicating that Ortega's alibi testimony was contrived. Ortega denied that defense counsel made such a remark. Yet, the prosecutor repeatedly accused defense counsel in his closing argument of conspiring to fabricate the defense.

5. Questions to Mr. Ortega insinuating that his alibi testimony was false because he had not earlier provided it to the police were also in bad faith. The prosecutor was well aware that Ortega had been arrested as an accessory to murder, had exercised his constitutional right to silence, and therefore did not have any reason to make the information available to the police prior to trial.

6. The prosecutor referred throughout his cross-examination of Mr. Ortega to defense counsel's role in formulating Ortega's testimony, repeatedly insinuating that Ortega testified as he did on direct orders from defense counsel. Specifically he asked Ortega whether defense counsel had instructed Ortega to avoid testimony in specific subject areas.

These unsupported accusations of fabrication by defense counsel violated Petitioner's right to a fair trial and to effective assistance of counsel. The repeated misconduct improperly attacking the witness and petitioner's attorneys, requires reversal of Petitioner's convictions.

XX

THE TRIAL COURT UNCONSTITUTIONALLY RESTRICTED PETITIONER'S RIGHT TO PRESENT A DEFENSE TO THE WELLS CASE BY PRECLUDING EVIDENCE OF THIRD PARTY CULPABILITY AND EVIDENCE OF OTHER NAMES FOUND IN WELLS' ADDRESS BOOK.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XIX, above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process and equal protection, to fair trial, and to fair and reliable guilt and penalty determinations because the trial court improperly excluded evidence that Ray Wells was the center of a violent East Los Angeles criminal operation involving drugs and stolen property, and that any of several criminal accomplices arrivals could have killed him.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. Detective Havercroft testified for the prosecution that his investigation at the Wells home yielded a piece of paper with defendant's nickname on it ("Chato") and the name "Pelon," and another piece of paper bearing the name "Moses Verduzco." The pieces of paper were introduced into evidence to prove petitioner's criminal connection to the Wells.

2. Havercroft also found a number of address books and "interviewed some of the people that [were] in the books". When defense counsel attempted to cross-examine Havercroft

about the other people interviewed and to introduce the book into evidence (Defense exhibits A, B, and C), the trial court sustained the prosecutor's objection to this line of questioning and refused to admit the books. The trial court ruled that "just because the names were introduced does not mean that you can introduce the names of every other individual whose name is in any of those books". Petitioner thereafter moved for a mistrial, which the trial court denied.

3. Petitioner sought to present evidence showing that Wells was heavily involved in a number of criminal activities and that various third parties had a substantial motive to kill him. Specifically, Petitioner sought to show that Wells was a cocaine dealer who sold from his home, was aware of the danger involved, in these activities and kept an arsenal of weapons to protect himself from robberies, ripoffs, and retaliations. Secondly, Wells was also involved in buying and selling stolen cars and auto parts and owed criminal associates substantial sums of money. Third, Wells had a double indemnity life insurance policy, of which the named beneficiary had been forged making Wells' associate, Chase Sweetzer the beneficiary.

4. Defense counsel presented these matters to the jury in opening statement. The prosecution moved to exclude any evidence on these points; and the trial court granted the motion. No evidence was ever admitted on the question of third party culpability for the Wells murders. A criminal defendant has the right to present evidence of third party culpability if the evidence raises a reasonable doubt about his own guilt on the charged offense.

5. The jury took an inordinate amount of time to reach a verdict on the Wells case indicating substantial questions about the sufficiency of the evidence. It is likely that had the jury been presented with evidence showing that other individuals had a substantial motive to kill Ray Wells, the jury would not have found Petitioner guilty, given the paucity of evidence connecting him to the crimes.

This error had a substantial and injurious effect or influence in determining the jury's verdict and rendered the guilt and penalty phase of Petitioner's trial unfair and unreliable. Accordingly, Petitioner's conviction and sentence must be overturned.

XXI

PETITIONER WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE PROSECUTION'S FAILURE TO DISCLOSE EVIDENCE OF OTHER CRIMINAL ASSOCIATES OF RAY WELLS, WHOSE ACTIVITIES MADE IT MORE LIKELY THAT A FALLING-OUT WITH ONE OR MORE OF THEM RESULTED IN THE FATAL RETALIATION OF NOVEMBER 1, 1984.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XX, above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process and equal protection, to a fair trial, and to fair and reliable guilty and penalty determinations because the prosecutor failed to disclose evidence of criminal cohorts of Ray Wells whose activities made it more likely that one or more of them, rather than Mr. Sandoval, was responsible for the Wells shootings.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. The record establishes that Ray Wells was involved in very serious criminal activities including large scale drug trafficking, auto theft, and other illegal adventures. Petitioner believes that law enforcement agents, at the time of trial, possessed material information regarding Wells' dangerous criminal activities which were not disclosed to the defense. Had this information been disclosed, Petitioner could have obtained information sufficient to present to the jury evidence

of third party culpability in the Wells murders. It is anticipated that further investigation and discovery in the course of this proceeding will lead to admissible evidence linking third persons to the actual perpetration of the crimes.

2. At trial, petitioner attempted to introduce evidence of third party culpability based on general indicia of criminal involvement, but the trial court excluded it because of the absence of any particular individual with motive and opportunity to kill the Wells. The prosecution failed to disclose evidence of particular antagonists of Ray Wells who could have been presented to the jury as equally or more likely to be the shooter than petitioner.

3. There was undisputed evidence in this case that Ray Wells had made a sudden decision to leave Los Angeles for Louisiana because he was in trouble with somebody. It is that somebody whose identity the defense was desperate to know in order to interpose a third party culpability defense. It cannot have been petitioner who so frightened Wells to cause him to flee the city, because Wells would not have let the eventual assassin into his house if that were the same person from which he was running. Moreover, he could not have been running from petitioner because Wells told petitioner's sister, Dorothy Sandoval, about his plans to leave a day or two before October 31. If it had been petitioner whom he believed to have a mortal grudge against him, he would not have told petitioner's sister and tipped off his plans to leave. Thus, there is a major question mark in this case as to who was the looming presence, undisclosed at trial, who frightened Wells into a decision to leave town.

4. The prosecution denied petitioner due process by failing to disclose more information about Wells' criminal dealings, because it is virtually certain that the actual killer numbered among them. Had petitioner had access to that information, he would have been able to further investigate and present that testimony at trial, leading to a reasonable probability that the jury would not have convicted him in the

Wells case.

This failure on the part of the prosecution to provide the potentially exculpatory evidence of third party culpability had a substantial and injurious effect or influence in determining the jury's verdict and rendered the guilt phase and penalty phase of Petitioner's trial unfair and unreliable. Accordingly, Petitioner's conviction must be overturned.

XXII

THE PROSECUTOR'S PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT DEPRIVED PETITIONER OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XXI, above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process and equal protection, to a fair trial, and to fair and reliable guilt and penalty determinations because the prosecutor's open hostility toward defense counsel and numerous prejudicial comments about defense counsel, made in front of the jury, rendered the trial fundamentally unfair. This conduct violated petitioner's federal constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. The prosecutor made personal attacks on the integrity of Petitioner's trial attorneys, and placed their personal integrity at issue by arguing that defense examination of witnesses involved efforts "to mislead [the jurors]. . .to give [them] certain impression about what the witness said," and accusing defense counsel of using that "ploy" in some unspecified number of instances. The prosecutor continued the attack: "There was some pont in the transcript I have noted here

where again, Mr. Applebaum tried to mislead you where he misunderstood the preliminary hearing testimony. . ." The prosecutor repeatedly returned to this theme: "They are trying to mislead you." "[T]hey have tried to mislead you and it hurts them because I am bringing it to your attention"; "[A]nother attempt by Ms. Kopple to mislead you"; "She [Ms. Kopple] intentionally misled you on that." Egregiously, the prosecutor accused defense counsel of presenting an alibi they knew to be false asserting that "this is an intentional fraud being perpetrated on the court."

The trial court recognized the inappropriateness of the prosecution's argument and after objection admonished the prosecutor as follows:

> "The Court: Mr. Milton, I am not sure the comment was based on the evidence. If it was, it was clearly disguised.
>
> I am going to admonished you to refrain from further attacks on counsel.
> Mr. Applebaum has indicated it's within the prerogative to discuss the evidence what you think the evidence shows and what you think of the evidence.
>
> "But I will admonish you now to cease and desist from any personal attacks on counsel, especially those which indicate the fraud as being perpetrated on the court by either counsel. It that understood?
>
> Mr. Milton: Yes Sir."

2. Despite the crystal-clear reprimand, the prosecutor during his rebuttal argument, relentlessly haranged the defense counsel by resuming his assertions that counsel was attempting to mislead the jury, misstating the evidence, and twisting the

facts despite the trial court's specific admonition to refrain from such conduct. [Typical of what's been happening in this trial," Applebaum "left out the other part [jury instruction] and again, intentionally"]; [Attorney Kopple "fantasized her way throughout this whole argument, again twisting the facts to suit her theory"]; [There was many instances during this argument that both Mr. Applebaum and Ms. Kopple misstated the evidence to suit their theory of the case for what they want you to believe"]; [She tried to inject that she had a whole sheaf of papers about Tostado's criminal records . . . knowing full well that that's improper and there is no evidence of it"]; [Again, a twisting of the facts. A little twist, but nevertheless, a twist"]; ["There is nothing unbelievable about Benny and they know it . . . but they have got to discredit him. They have got to discredit what's happened here because they have got to get him off. Let that killer walk out this front door . . . ."]).

3. The prosecution committed gross misconduct when it argued to the jury assertions based not on the facts admitted into evidence, but argued based on his personal opinion as to the defense counsel's reactions to some evidence. The prosecutor's personal assessment that defense counsel gave a negative emotional reaction to the introduction of some items of evidence, or to the course of certain testimony, is not evidence, nor a matter of record in the case. Thus, the prosecutor's assertion that defense counsel were mad, stunned, flabbergasted, devastated, floored, and/or blown away by the turn of events during testimony constitute blatant misconduct.

Unmistakably the prosecution by its argument urged the jury to infer the Petitioner's guilt from the asserted negative reactions of defense counsel to the various evidentiary developments. The prosecutor argued that defense counsel hoped to show that appellant had been fighting with the victims and "in self-defense had to shot these boys, " but "they [defense counsel] were stunned to find out if it was Tostado that was fighting . . . . stunned. Similarly, regarding Tostado's testimony that he threw a trash can at the window of his car so he could

get the keys which were locked inside, the prosecutor argued "I tell you, this was devastating to them. It blew their mass confusion . . . . I bet they have a tough time addressing that when they get up here. Every time they mention mass confusion, I want you all at once (indicating [gesture]) every time they say mass confusion. They won't do it anymore." The prosecutor continued to comment on his perception of counsel's reaction to the evidence:

> "That's why they were so upset when Havercroft came back and testified that he found the vitamin containers and catalogs for the vitamins. The were visibly mad with Havercroft."

The prosecutor continued this theme of a personal duel between himself and Attorney

Kopple:

> "Now you heard all that testimony in cross-examination by Ms. Kopple because it's another ploy or to get you to think well, the killers were up therein the attic hiding when the police got there. . . and it blew her away when he told her about that photograph. She saw this photograph, looked up at that thing, opened and said 'Oh, the killers must have gone up there' and then when she got an explanation in court through Bob Havercroft that was obviously a repair job being done, she backed off of it again.
>
> "Now you know what, I'll bet you dollars to donuts she doesn't mention it anymore. I will wait and see. I will wait and see if she talks about that."

The prosecutor imputed a similarly startled reaction to defense counsel from testimony on redirect by Benny Verduzco that he spoke to Ralph Ortega in the course of conducting a heroin deal –"Flabbergasted them. It floored them, believe me."

4. The prosecutor listed a number of defense witnesses to whom he attributed lies, lies, and more lies. At virtually every opportunity he interjected his personal opinion that the defense attorneys had intentionally fabricated a defense. The prosecutor did not base either on his personal opinion, or on equally improper accusations that defense counsel fabricated the defense because they knew petitioner was guilty.

The prosecutor peppered his argument with pejorative characterizations using terms of fabricating, concocting, and otherwise falsely creating a defense. [regarding ballistics evidence, "Had he not done that, they would probably have concocted something . . . "]; [But they are going to cloud this as much as they can"]; ["They [defense counsel] had to call [Sandra] for a purpose because now Talk is knocked out of the box. So Sandra continues to perpetuate the lie"] [Why would they [defense counsel] even tell you of this anyway. Why are they doing all of this? Because they have to create this alibi for the defendant"]; ["You heard from Sandra Ramirez, again another witness to perpetuate the lie"]; ["They have just created and woven themselves into so many lies it doesn't make sense"]; ["They have woven so many lies, you just can't get out of it"; objection overruled]; ["Self-defense is impossible and they know it. But they have got to say something. They have to"]; ["It baffles me that I have to sit here all this to you because of the nature of the argument that was given, I mean, I don't see how she [Attorney Kopple] could have possibly argued this with a straight face. She'd probably have trouble doing it herself . . . "; objection overruled]; ["They [defense counsel] will take it to the end. They will say what ever is necessary. It's like a little child, one lie after another"; objection based on 'personal attacks upon counsel' sustained; admonishment

denied].) He culminated his review by referring to Ralph Ortega and asserting that "I shake my head in disbelief every time I think about it" (objection overruled).

There should be no mistake that the prosecutor explicitly accused the defense of an intentional plan to fabricate and concoct evidence. One of the prosecutor's most venomous arguments related to trial Attorney Applebaum's cross-examination of prosecution witness Susan Martinez:

> "She was cross-examined by Mr. Applebaum. And here is where he tried to set up the lies by Ralph Ortega by asking this witness and insinuating that another car was on the parking lot. And this witness said no, there weren't any other cars on the parking lot at this point. This early in the proceeding Applebaum is trying to place Ortega's car there, trying to set it up, knowing later he is going to call that liar [Ortega to the stand and give that phoney baloney that he gave you."

Since the prosecutor's opinion was not based on inferences from the evidence, the jury could reasonably infer that this opinion was based on extrajudicial information in his possession about what the defense counsel knew, i.e., that defendant had killed all four victims. The jurors would very likely have interpreted the prosecutor's comments as based on official information within the prosecutor's purview, although not in evidence.

5. The prosecutor commented repeatedly on what the jury "would have heard" from petitioner had the petitioner not foreclosed that testimony. This called the jury's attention to petitioner's exercise of his right not to testify and also amounted to prosecutorial misconduct by, in effect, testifying for Mr. Sandoval to his detriment. As petitioner did not take the stand, there was, of course, no evidence before the jury as

to what he might have said about the events in Belvedere Park. But this did not stop the prosecuting attorney. He put words into petitioner's mouth and then argued from his invented "facts" the inference that since petitioner would have lied had the prosecutor "given a little rope to hang themselves," all the defense witnesses (in addition to defense counsel) were lying.

6. The prosecutor argued that Mr. Sandoval's courtroom appearance, the fact that he was clean cut, had no mustache, was wearing glasses, dressed in a suit, was "just a ploy." The prosecutor also argued that petitioner's use of reading glasses during trial was another ploy, not withstanding the fact that medical records entered in evidence showed that he needed glasses for reading. (RT 4674). Undaunted by this fact, the prosecutor argued directly contrary to the record, that petitioner did not need glasses and that he wore in court only as a "ploy."

7. Not only did the prosecutor argue facts not in evidence but then went on to accuse defense counsel of conspiring to carry out this "ploy" on the jurors.

The prosecutor's remarks, about the character of defense counsel and statements to the jury that the attorneys for Petitioner were intentionally misleading the jurors and urging witnesses to lie in court, deprive a criminal defendant of a fair trial. Such prosecutorial characterizations as employed here violated due process because they severely damaged Petitioner's opportunity to have the jury consider the case's facts objectively and baselessly placed at issue the personal integrity of his defense attorneys as a factor for the jury to weigh in its deliberations.

The improper conduct of the prosecutor had a substantial and injurious effect or influence in determining the jury's verdict and rendered the guilt phase and penalty phase of petitioner's trial unfair and unreliable. Accordingly, petitioner's conviction must be overturned.

XXIII

THE TRIAL COURT'S EVIDENTIARY

RULINGS VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF THE LAW AND TO A FAIR TRIAL.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XXII, above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process, to a fair trial, and to fair and reliable guilt and penalty determinations because the impact of the trial court's improper evidentiary rulings noted herein resulted in a violation of petitioner's federal constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. Over the objection of defense counsel the trial court permitted the prosecutor to elicit testimony of petitioner's purported gang affiliations despite the lack of any connection between gang membership and the murders for which petitioner was charged.

2. The defense sought to introduce detailed evidence through witnesses Rene Rodas, Irene Ocampo Wells, Chase Sweetzer II, Chase Sweetzer III aka Jack Dominguez, and others, establishing the criminally-oriented and highly suspicious life style engaged in by Ray Wells, pointing out the likelihood that other individuals had a motive and opportunity to kill Ray Wells, and to rebut any evidence of motive offered by the prosecution with respect to petitioner's culpability for the Wells killings. The trial court improperly excluded this highly probative evidence.

The improper evidentiary rulings by the trial court had a substantial and injurious effect or influence in determining the jury's verdict and rendered the guilt phase and penalty phase of petitioner's trial unfair and unreliable. Accordingly, petitioner's conviction must be overturned.

PENALTY PHASE ISSUES

XXIV

THE PROSECUTOR VIOLATED PETITIONER'S RIGHTS TO DUE PROCESS, A FAIR TRIAL, SEPARATION OF CHURCH AND STATE, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT BY INVOKING PURPORTED BIBLICAL AUTHORITY AND URGING THE JURY TO IMPOSE THE DEATH PENALTY AS A FORM OF DOING GOD'S WORK.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XXIII, above.

Petitioner's sentences were rendered in violation of his rights to due process, to a fair trial, and to fair and reliable penalty determinations by the prosecutor's egregious and prejudicial misconduct during his closing argument at the penalty phase of petitioner's trial, where he invoked biblical authority in support of imposition of the death penalty. This misconduct violated petitioner's federal constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. In closing argument the prosecutor stated that he wanted to respond to some of the issues raised by defense counsel. After telling the jury that they did not have to "feel burdened and depressed" if they voted for the death penalty, he made the following argument:

> "[The Prosecutor]: You will hear other antics and whatever Ms. Kopple is going to come up with. I won't be responding probably, but you can't lose focus. Don't

feel guilty about what your decision is."

"Mr. Applebaum says don't play God. Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority was opposed the ordinance of God and they who have opposed will receive condemnations upon themselves for rules are not a cause of fear for good behavior but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God and avenger who brings wrath upon one who practices evil."

"You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right. . . . Don't be fooled by what's to come by Ms. Kopple. Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."

"[Ms. Kopple]: I'm going to object to these references, your Honor, and ask to approach the bench."

"[The Court]: Request denied." (RT 6539-

6540; emphasis supplied)

2. This is a quote/paraphrase from the text of Romans XIII:1-4, in which Paul asserts that it is a Christian's duty to submit to and carry out the law of civil authorities as the vehicle through which God acts in the world to eradicate sin. The Holy Bible, King James version, states as follows at Romans, XIII, 1-4:

> "Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained by God.
>
> Whoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation.
>
> For rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power. Do that which is good, and thou shalt have praise of the same.
>
> For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain. For he is the minister of God, a revenger to execute wrath upon him that doeth evil."

The prosecutor called on the jury to destroy defendant's corruptible body in order to save his immortal sole. He essentially argued that a higher and independent source of law exists sanctioning the death penalty as the appropriate punishment for Mr. Sandoval. Indeed, he argued that the Bible commands that a murderer be put to death. Obviously the prosecutor's interjection of religious law as an additional factor for the jury's consideration neither flows from the evidence nor any legitimate inference to be drawn therefrom.

3. For Christians on the jury the biblical references were very potent reminders of early Christianity's assertion that the sword of the state could legitimately be wielded under divine authority against simple law breakers. This was an advocacy for the death penalty. Thus, the prosecutor sought to place an ecclesiastical imprimatur on the death sentence sought against Mr. Sandoval. For any members of the jury who accepted as literal truth the pronouncements contained in the Bible, it constituted essentially a divine instruction to vote for death.

4. Moreover, the prosecutor sought to reduce, if not eliminate, the jury's sense of personal responsibility for determining the appropriateness of death. In this regard, the prosecutor stated that, "the defense wants to make that [the penalty decision] burdensome for you" but that "don't once think that you have to feel burdened and depressed because I voted for death" . . . "don't feel guilty about what your decision is." And, the prosecutor added: "Well, if it wasn't you called upon to carry out the will of the people of the State of California, it would have been another jury, because that's our system. That's how the law is effected in this state. Don't once think that you have to feel burdened and depressed because I voted for death. You are doing what the law says if it's substantial, the aggravation substantially outweighs the mitigation. Don't listen to this lawyer talk."

5. The effect of the prosecutor's argument was to make a very difficult choice for each individual juror an easier one. We know that jurors found this decision to be exceptionally difficult. Indeed, after more than three days of deliberation they were evenly split on the agonizing choice of death or life imprisonment. In this context, the prosecutor's argument that the source primary of moral authority for the Judeo-Christian world approved of the death penalty for petitioner may very well have made the crucial difference in the jury's decision.

Without the improper prosecutorial invocation of biblical authority for imposition of the death penalty, it is very likely that the jury would have returned an early verdict of life

imprisonment. At the very least, the prosecutor's argument opened the door to the compromise verdict that occurred here. The prosecutor's argument, thus, had a substantial and injurious effect or influence in determining the jury's verdict and rendered the penalty phase at Petitioner's trial unfair and unreliable. Accordingly, Petitioner's sentence of death must be overturned.

XXV

PETITIONER WAS DEPRIVED THE EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S FAILURE TO ADEQUATELY INVESTIGATE AND PRESENT MENTAL STATE MITIGATION AT THE PENALTY TRIAL.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XXIV above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process and equal protection, to a fair trial, to the effective assistance of counsel, and to fair and reliable penalty determination because trial counsel's representation was ineffective at the penalty phase of trial in that counsel failed to introduce readily available evidence of petitioner's mental deficiencies petitioner committed the crime. This omission violated petitioner's federal constitutional rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. **California Penal Code § 190.3** provides that where the defendant may be subject to the death penalty, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for life without possibility of parole. In the proceedings on the question of penalty, a defendant may present any matter relevant to mitigation, including defendant's

mental condition. In most situations, expert testimony on a capital defendant's medical condition will be absolutely essential to a full presentation of mitigating circumstances. Here, petitioner had very serious mental deficiencies which, if properly presented to the jury, would almost certainly have resulted in a sentence of life in prison rather than the death penalty. Failure of trial counsel to present such evidence violated Petitioner's constitutional right to effective assistance of counsel. The facts indicated in the record to date are discussed below. It is anticipated that further investigation and discovery will provide additional facts probative of this very serious deficiency in representation of Petitioner.

2. Defense counsel conducted no mental state investigation whatsoever prior to the return of the guilt phase verdicts in this case. Between the return of the guilt phase verdicts and the commencement of the penalty trial a few days later, counsel for petitioner arranged for a psychological examination through a Michael Maloney, Ph.D. Dr. Maloney did not, in fact, testify at the penalty phase because of defense counsel's decision not to disclose to the trial court, for review in camera, the materials reviewed and relied on by Dr. Maloney during the course of his examination of Petitioner. A member of Dr. Maloney's staff administered a partial MMPI (Minnesota Multiphasic Personality Inventory) test to petitioner, and Dr. Maloney reviewed documents regarding petitioner's criminal history and interviewed petitioner. However, neither Dr. Maloney nor anyone else acting on behalf of petitioner conducted any minimal, much less reasonably adequate, inquiry regarding potential organic brain injuries and post traumatic stress disorder of petitioner, resulting from either multiple traumatic injuries or prolonged substance abuse.

3. At the time of the offenses, petitioner suffered from a number of inter-related organic mental disorders which, if known to the jury, would have reduced his culpability for the offenses charged and also provided mitigating evidence in the penalty phase proceedings. These included the following:

(a) Mr. Sandoval suffers from right frontal lobe brain damage resulting from multiple head trauma suffered as a child. The history includes at least fourteen head blows resulting in loss of consciousness. He suffered additional head injuries in a car accident as an adult.

(b) The years petitioner spent in an abusive family and a barrio environment steeped in violence, chaos and trauma, left him with a post traumatic stress disorder.

(c) Petitioner had a long history of alcohol, drug and other substance abuse including glue inhalation, heroin, cocaine, hallucinogens from the time he was introduce to alcohol by his mother at the age of six or seven, and at the time of the shootings given rise to this case he had an overpowering addiction to alcohol and drugs. This history of substance abuse suggested permanent brain injury.

(d) In addition to the psychological and organic disabilities, the long history of traumatic stress resulting from his upbringing, petitioner state of intoxication at the time of the Belvedere Park shootings exaggerated his organically based mental difficulties.

4. Petitioner was denied the effective assistance of counsel when his trial counsel failed to investigate and develop the issue of Petitioner's mental disabilities and present them as a factor in mitigation. Given the evidence of post traumatic stress disorder, organic brain damage and substance addiction, counsel should have, at a minimum, marshaled the evidence showing extreme mental and emotional disturbance as one of the substantial mitigating circumstances. Moreover, counsel should have undertaken the following:

(a) Obtained a specialist experienced in document and life history and character changes to assist counsel;

(b) Retained a licensed clinical psychologist to conduct neuropsychological testing;

(c) Retained a psychologist to study historical data, interviews, test results, and other information gathered concerning Petitioner.

Under the circumstances, the jury was not given the opportunity to consider Petitioner's very serious mental disorders in the penalty proceedings. There was no tactical or strategic decision justifying the omission. As a result, the death verdict was rendered unreliable. If the jury had know this information, it is probable that its verdict would have been favorable to Mr. Sandoval. The failure of Petitioner's trial counsel to provide effective assistance in this regard had a substantial and injurious effect or influence in determining the jury's verdict and rendered the penalty phase of Petitioner's trial unfair. Accordingly, Petitioner's sentence must be overturned and he must be retried.

XXVI

PETITIONER'S DEATH SENTENCE WAS UNCONSTITUTIONALLY IMPOSED IN LIGHT OF THE JURY INSTRUCTION THAT HIS AGE COULD, AND THE PROSECUTOR'S ARGUMENT THAT IT SHOULD BE CONSIDERED AS A FACTOR IN AGGRAVATION.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XXV, above.

Petitioner's convictions and sentences were rendered in violation of his rights to due process, a fair trial, to the effective assistance of counsel, to a reliable and accurate penalty determination, and to be free from cruel and unusual punishment, because the court improperly instructed the jury that petitioner's age could, and the prosecutor's argument that it should, be considered as a factor in aggravation.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. Prior to penalty argument in this case, petitioner proffered and the court rejected an instruction that his age may be considered, if at all, only as a mitigating factor (RT 6468).

Petitioner was 26 years old at the time of the offenses. Based on the court's view of what penalty factors were relevant, the court declined to give those portions of CALJIC 8.84.1 which correspond to subsections (d), (e), (g), and (j) of Penal Code § 190.3. In spite of defense counsel's argument that age could be considered, if at all, in mitigation, and a request for an instruction to that effect (RT 6436), the court gave the unadorned portion of 8.84.1 identifying age as a relevant factor but without any clarifying instruction as to whether it could be considered in aggravation or mitigation or providing any other guidance as to its application.

2. During penalty argument, the prosecutor reviewed the Penal Code § 190.3 factors which were contained in the court's instruction, and argued as follows with respect to petitioner's age:

> "The age of the defendant at the time of the crime. He is obviously old enough to know the difference between right and wrong, and that's aggravation."

Petitioner's objection was summarily overruled.

3. That failure to restrict the age factor to potential mitigation puts California in a unique and unconstitutional posture among all other capital sentencing jurisdictions. No other statute lists age in an undifferentiated list of facts which can be either aggravating or mitigating. No state statute lists age as a potentially aggravating factor. Every statute which refers to age at all specifically lists it as a potentially mitigating factor.

4. Thus, the California capital sentencing procedure is unconstitutional to the extent that it permits age to be considered as an aggravating factor, and petitioner's death sentence was unconstitutionally imposed because the jury instructions permitted, and the prosecutor specifically urged, the jury to consider petitioner's age in aggravation.

This error had a substantially and injurious effect or influence in determining the jury's verdict and rendered the

penalty phase of Petitioner's unfair and unreliable. Accordingly, Petitioner sentence was be overturned.

XXVII

PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO DECLARE A MISTRIAL AFTER THE PENALTY JURY'S UNEQUIVOCAL DECLARATION OF DEADLOCK.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XXVI, above.

Petitioner's sentences were rendered in violation of his rights to due process, to a fair trial, to fair, reliable, and non-arbitrary penalty determinations by the trial court's action in ordering the jury to continue deliberations after their announcement of an unequivocal deadlock. The result was a compromise verdict that violated petitioner's federal constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. The jury began deliberating on Thursday, March 12, 1987. On the morning of Friday, March 13, after they were given, over defense objection, separate verdict forms for each victim, the jury returned with the question "can the jury unanimously find that different penalties are applicable to different counts? Instructions stated that we must unanimously reach 'a' verdict."

2. The court instructed the jury, again over defense objection and motion for mistrial, that the jury "should reach a verdict as to each count if you can."

3. After further deliberation, the jury sent the trial court a note in the afternoon of Wednesday, March 18, "Cannot reach a verdict. How do you proceed from this point on, and what

would you like us to do?" The court called the jury out and specifically asked the foreman whether there was "any reasonable possibility, and I emphasize the word 'possible,' that the jury can arrive at a verdict as to any count, given further deliberations, the rereading of any testimony or the answering of any question that I can answer." The foreman answered "no" and specifically stated "we have discussed that possibility, and we don't believe that we can reach a verdict."

4. The trial court then asked for the jury division on each count and the foreman reported that it was six to six on count one, six to six on count two, five to seven on count three, and five to seven on count four, a virtually even split. The trial court then polled each juror individually as to "whether you think there is a reasonable possibility, with further deliberations, you can arrive at a verdict as to any of the counts," and each juror unequivocally answered "no."

5. In a conference outside the jury's presence, the trial court indicated that he wanted to have them deliberate more, "even [though] I don't see much hope of switching the vote." The trial court denied the defense motion for mistrial (ibid.).

6. The trial court called the jury in and instructed them, "Without any further explanation in the matter, I am going to ask you to continue your deliberations" (RT 6604). The court released the jury for that day with directions to return at 7:45 the next morning.

7. On that next morning, Thursday, March 19, the jury returned its verdicts of life with respect to counts one, two, and three, and a verdict of death as to count four.

8. According to the trial court, the jury had been deliberating over a course of five days with a total of "three plus full days" of actual deliberation. Thus, the appropriate penalty had been fully discussed by the jurors on the basis of the evidence presented. The jurors declaration of deadlock was unequivocal. They split virtually down the middle on two counts and were only one vote away from an exact split on the others. And, each individual juror stated that they could not

arrive at a verdict on any count. The jurors had actually discussed among themselves the possibility that further deliberations would lead to a verdict and all agreed that it would not do so.

When the court directed the jury to continue deliberating despite the unequivocal declaration of deadlock, the jury inevitably resorted to some basis other than the evidence to make their determination. Thus, a compromise verdict was inevitable.

The improper coercion of the jury resulted in the denial of rights guaranteed Petitioner by Fifth, Sixth, and Eighth Amendments of the United States Constitution. These errors had substantial and injurious effect or influence in determining the jury's verdict of death and rendered Petitioner's trial unfair and unreliable. Accordingly, Petitioner's sentence must be overturned.

XXVIII

PETITIONER WAS DEPRIVED OF A FULL AND FAIR PENALTY HEARING BECAUSE NEWLY DISCOVERED EVIDENCE OF CHILDHOOD TRAUMA AND ABUSE, FAR EXCEEDING THAT PRESENTED AT TRIAL, WAS NOT PRESENTED TO THE JURY.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XXVII, above.

1. At trial, the defense called witnesses from petitioner's family to describe an impoverished upbringing, compounded by the death of petitioner's father when petitioner was seven years old, followed by the disintegration of the family structure. There was also testimony that subsequent boyfriends of the mother mistreated some of the younger children and that petitioner and his siblings, left to their own devices, were forced to defend themselves from the mother's boyfriend, Johnny Morales, portrayed by their mother as their "stepfather."

2. Subsequent investigation conducted during the course

of the state habeas corpus proceedings revealed the existence of extended and pervasive childhood trauma far exceeding that presented at trial. The description of traumatic abuse inflicted by Johnny Morales were submitted through the declaration of an experienced mental health professional who, in graphic detail, described the nature and magnitude of the distress.

3. Expert mental health professionals who have examined Petitioner subsequent to his trial have revealed a pattern of abuse to which Petitioner was subjected, far beyond that presented at trial, which shows a tragic figure to which the penalty phase jurors were never exposed. Where newly discovered evidence undermines the entire prosecution case, habeas corpus relief is warranted. This newly discovered evidence of Petitioner's mental state undermines the entire prosecution penalty phase case and thus warrants habeas corpus relief.

XXIX

PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION BY THE ARBITRARY AND DISCRIMINATORY IMPOSITION OF THE DEATH PENALTY, BASED ON UNCONSTITUTIONAL FACTORS RELATED TO PETITIONER AND THE VICTIMS.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XXVIII, above.

The death penalty in this case was arbitrarily and discriminatory imposed on petitioner only with respect to the murder conviction based on Marlene Wells' death. Regarding the other three homicide counts, petitioner was given life verdict, in spite of the fact that under the instructions given by the court, the total amount of aggravation versus mitigation was by logical necessity exactly the same as to each count. Petitioner was thus arbitrarily and discriminatory given the death penalty based on unconstitutional factors including race,

gender, and socioeconomic status.

The death penalty was arbitrarily and discriminatory inflicted on petitioner on the Marlene Wells count based on his ethnicity as Hispanic and Marlene Wells' ethnicity as white. The death penalty was imposed because of the cross-race component of this killing, petitioner coming from a disadvantaged minority and Marlene Wells coming from the white middle class.

Petitioner was arbitrarily given the death penalty because of his gender as a male versus Marlene Wells' female gender. The cross-gender component of the offense improperly contributed to the death sentence on this case.

The death penalty was imposed because of petitioner's status as an impoverished member of a presumptively criminal caste, an Hispanic street gang as repeatedly characterized by the prosecutor, versus Marlene Wells' status as a member of the middle class, apparently uninvolved in criminal activities.

The arbitrary and discriminatory aspect of the death penalty in this case is readily apparent from the contrast with the three counts for which the death penalty was not imposed. Petitioner was not given the death penalty on the counts related to Anthony Aceves and Gilbert Martinez, both young male Hispanics from the same socioeconomic status as petitioner. Nor was he given the death penalty for the count relating to Ray Wells, a white male obviously involved in a criminal subculture.

The irrationality of the death penalty under these circumstances is clear in that whatever aggravating circumstances were inherent in the death of Marlene Wells, those circumstances should have been factored into the total quantum of aggravation accompanying each of the other counts under the jury instruction specifying as the first aggravating factor "the circumstances of the offense." Any legitimate aggravating aspects of the Marlene Wells killing should have been factored into the jury deliberations with respect to each of the homicide counts, so that the total quantum of aggravation

and mitigation considered by the jury on each count was identical.

The fact that the jury returned three life verdicts and one death verdict reveals that the death penalty was imposed not in an exercise of guided discretion focusing on the nature of the offense and the character of the offender, but rather unconstitutionally impermissible and irrelevant characteristics of the defendant and victim, and their combination.

Petitioner was denied rights guaranteed him by the Due Process Clause of the Fourteenth Amendment, the Sixth and Eighth Amendments to the Constitution. These errors had a substantial and injurious effect or influence in determining the jury's verdict of death and rendered Petitioner's trial unfair and unreliable. Accordingly, Petitioner's sentence must be overturned.

XXX

PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT WERE VIOLATED BY THE TRIAL COURT'S APPROVAL OF THE PROSECUTOR'S APPEAL FOR THE JURY TO SPECULATE AS TO THE NATURE AND MAGNITUDE OF THE SUFFERING EXPERIENCED BY THE DECEDENTS AND THEIR SURVIVING FAMILIES.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XIX, above.

Petitioner's sentences were rendered in violation of his rights to due process, to a fair trial, to fair, reliable, and non-arbitrary penalty determinations by the trial court's action in ordering the jury to continue deliberations after their announcement of an unequivocal deadlock. The result was a compromise verdict that violated petitioner's federal constitutional rights as guaranteed by the Fifth, Sixth, Eighth,

and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

The prosecutor, in his closing argument, attempted to negate the mitigating force of defense evidence of Mr. Sandoval's very difficult upbringing including the death of his father by urging the jury to take the photograph of the funeral of petitioner's father, to imagine that it was a funeral of the victims in this case, and to speculate as to the tragic effects of the victims' deaths on these families. (RT 6540-6541).

In the same passage, the prosecutor also urged the jury to imagine a speculative and terrifying scenario regarding the death of Marlene Wells:

> "Marlene Wells. When she was on the ground and the defendant standing over her and putting two bullets in the back of hear head. Just before she is looking up at him. 'Don't kill me.' Pleading, begging for her life. And he shoots her brutally in the back of the head." (RT 6540-6541)

The prosecutor's improper argument that the jury should consider victim impact in its sentencing decision violated the law applicable at the time of petitioner's trial. This created an impermissible risk that a juror voted for death based on arbitrary and capricious factors. The victim impact evidence argument was highly prejudicial and infected the sentencing proceeding, rendering it fundamentally unfair.

Prosecutorial argument regarding imagined sufferings of the victim was highly prejudicial and a violation of due process. Here, the prosecutor's repeated remonstration that the jury imagine both the suffering of Marlene Wells before she died and the suffering of the victims families after the deaths of their loved ones, had a substantial and injurious effect in determining the jury's verdict and the penalty phase of Petitioner's trial was thereby rendered unfair and unreliable.

XXXI

PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO REQUIRE THE JURY TO RETURN A UNITARY PENALTY VERDICT OF DEATH OR LIFE WITHOUT PAROLE.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XXX, above.

Petitioner's sentences were rendered in violation of his rights to due process, to a fair trial, to fair and reliable penalty determinations by the trial court's instruction that the jury return a separate penalty verdict as to each murder victim. This violated petitioner's federal constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. The trial court committed error of constitutional dimension by requiring the jury to return a separate penalty verdict as to each murder victim. The use of multiple penalty verdicts under the circumstances where the jury was almost evenly split on each individual count, multiple verdicts obscured the constitutional requirement that the jury reach a comprehensive determination of the appropriateness of the death penalty considering all aggravating and mitigating circumstances rather than
circum to compromise verdicts.

2. At the conclusion of the penalty phase and after the jury had retired for deliberations, the court and counsel considered the matter of verdict forms. Defense counsel argued that "there should be only one verdict for death or life" (RT. 6568). The prosecutor contended that while he "initially . . .

thought it might be more appropriate to have just two forms he had come to the conclusion, that "just two forms now would be confusing to them," amounting to what he characterized as a "one lump sum" verdict (RT. 6571). The trial court agreed with the prosecution, giving separate verdicts for each count.

3. After deliberating for approximately four hours, the jury returned with a question. The trial court engaged in the following colloquy with the foreperson:

> "The Court: . . . . The question you have asked, Miss Juras, is "Can a jury unanimously find that different penalties are applicable to different counts. The instructions say that we must unanimously reach 'a' verdict.
>
> "In this matter, you should reach a verdict as to each count if you can. Does that answer the questions? The court is not telling you what verdict to arrive at for any count.
>
> "Ms. Juras: I think we were somewhat confused by the fact that the instruction said 'a' verdict, but when the verdict sheets came back to us, we realized there was a sheet for each count.
>
> "The Court: Well, in case in chief, the same instruction was read regarding a verdict. But a verdict is brought in as to each count. In this case, there are four counts and you should arrive at whatever verdict you feel is appropriate, given the evidence as to each count." (RT 6592)

The jury was then directed to continue deliberations. After three more days of deliberation, the jury returned a

note reading, "Cannot reach a verdict. How do you proceed from this point on, and what would you like us to do?" (RT 6597). Upon inquiry by the court, the foreman confirmed deadlock and stated the voting was as follows: Count 1 -- six to six; count 2 -- six to six; count 3 -- five to seven; count 4 -- five to seven (RT 6600). The trial court polled the jurors and each stated that they did not believe there was a reasonable possibility that further deliberation would result in a verdict (RT 6601). The trial court denied the defense request to declare a mistrial at that point and told the jury, "without any further explanation in the matter, I'm going to ask you to continue your deliberations" (RT 6604). After some four hours of deliberation the following day, the jurors announced the verdict. The verdicts were life without possibility of parole for counts 1 through 3 and death for count 4.

4. Logically, the jury should not be given the opportunity to return different penalty verdicts for different homicide counts in a multiple murder case. For each count, the totality of the aggravating and mitigating circumstances was precisely the same. The factors that go into that determination are the circumstances of the offense upon which each count is based, the circumstances of the other offenses, the prosecutor's aggravating evidence and the defendant's mitigating evidence. Thus, the total quantum of aggravation and mitigation will be precisely the same for each count. The jury's responsibility was to determine the overall appropriateness of the death penalty in light of the totality of circumstances. This process was undermined by the process of deliberation on a count by count basis. Inevitably, the jury would have to focus, not on the appropriateness of the death penalty for the defendant, but the constitutionally improper question of the characteristics and status of the victims. In this case, death verdicts were rejected with respect to the three male victims and the death verdict returned with respect to the single female victim, Marlene Wells.

5. On the evening prior to returning their verdict, the

jurors were split almost evenly on each count. The morning following their declaration of deadlock, the jury reached its logically inconsistent verdict of three life sentences and one death sentence. The multiple penalty verdict procedure, thus, raises the very substantial likelihood that jurors favoring a life verdict on all counts traded their life votes on Marlene Wells Count in return for the pro-death jurors providing them with unanimous life verdicts on the three counts involved in the male victims. This constitutionally impermissible process undermines the reliability of the penalty determination in violation of the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution.

6. Compromised verdicts are anathema in criminal cases because they violate the defendant's constitutional rights to acquittal unless each member of the jury finds that the evidence establishes his guilt beyond a reasonable doubt. A compromise verdict occurs where several members of the jury abandon their beliefs and settle upon a common ground with their fellow jurors. Under these circumstances the defendant has not been found guilty beyond a reasonable doubt by all members of the jury and he has been denied due process of law. The death penalty in this matter was imposed in an arbitrary and capricious manner rendering the penalty phase of Petitioner's trial unfair and unreliable. Accordingly, Petitioner's sentence must be overturned.

XXXII

THE JURY WAS EFFECTIVELY PREVENTED FROM CONSIDERING LINGERING DOUBT. THUS VIOLATING HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XXXI, above.

Petitioner was deprived of his rights to due process of law, to a fair trial, to a jury trial and not to be subjected to cruel and unusual punishment under the Fifth, Eighth, and Fourteenth

Amendments during the penalty phase by effectively removing from the jurors their authority to consider their lingering doubts about Petitioner's guilt.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. Under California law, lingering doubt is a factor in mitigation of penalty which may be considered by the jury in determining the appropriateness of the death penalty. Yet, in its exclusion of evidence offered by defendant, and by its refusal of a defense instruction that the jury could consider lingering doubt, the trial court improperly removed from the province of the jury the lingering doubt issue. Had the trial court not so ruled, it is reasonably probable that the penalty phase jury would not have sentenced Petitioner to death.

2. During the penalty phase of the trial, counsel for petitioner moved the court for the opportunity to present evidence of lingering doubt with respect to the identity of the perpetrator of the Wells murders. Counsel sought to present evidence suggesting that Ray Wells was killed by beneficiaries to collect on his life insurance policy (and that Marlene Wells was killed by the same individual because she was present when her husband was killed). Specifically, the defense sought to present the following evidence:

(a) In August, 1979, Wells purportedly married Irene Ocampo. They had two children. Wells was an abusive husband and Irene finally left him in September, 1983, returning to her home in the Philippines with her children.

(b) On March 1, 1984, Wells, who was 38 years old and unemployed, took out a $50,000.00 life insurance policy with Marlene Lukasky (later Marlene Wells) as the named beneficiary. This policy had a double indemnity clause for accidental (or violent) death.

(c) On March 30, 1984, a change of beneficiary statement was signed purportedly by Ray Wells, and witnessed by Mark Reisbord, the life insurance salesman for Equitable

Life Insurance Company who sold Wells the policy. The change added Chase Sweetzer, an acquaintance of Wells who was at the time 71 years old, as a 50-50 co-beneficiary with Marlene. Chase Sweetzer had an adopted son, Chase Sweetzer III, aka Jack Dominguez.

(d) On April 17, 1984, Wells left for Manila, apparently to reconcile with Irene. They remarried in a small town outside Manila on April 23, 1984. However, Wells returned alone to Los Angeles on April 28, 1984, moving back in with Marlene. Irene returned to Los Angeles with her two sons in July, 1984, but could not locate Wells. The next information she received about Ray Wells was on November 1, 1984, when the police contacted her about his murder.

(e) During the period 1982 - 84, Chase Sweetzer loaned Wells nearly $30,000.00, mostly for rent, living expenses, and advances on auto repair work Wells was doing for him.

(f) Irene Ocampo made a written claim for widows and children's benefits under the Equitable life insurance policy on November 24, 1984. Her claim was allegedly rejected by Reisbord because she was not listed as a beneficiary. In a subsequent civil trial between Irene Ocampo and Equitable, the following conclusions were reached:

(1) The jury found the signature of Ray Wells on the Change of Beneficiary form to be a forgery.

(2) The copy of the coroner's death certificate introduced in evidence at that trial showed the time of death for Marlene Wells as 0040 hours and Ray Wells' time of death at 0640 hours. In fact, police arrived at approximately 12:40 a.m. on October 31, 1984, to find both Ray and Marlene dead. This error caused a determination by the trial court that since Marlene predeceased Ray, she could no longer be considered a beneficiary.

(3) As a result of the foregoing, it was determined that Ray Wells died intestate and his heirs, the two sons by Irene, were entitled to the policy.

(g) If Ray and Marlene Wells were killed and Marlene died first, Chase Sweetzer would have been the sole beneficiary under the policy. No one would have questioned the forgery of the beneficiary had Irene Ocampo not returned from the Philippines and asserted her claim on the policy. The evidence suggests that Chase Sweetzer, junior or senior, had Ray Wells killed to collect on the insurance policy.

3. The court ruled on defendant's motion as follows:

> "All right. I have considered your offer of proof. I have considered your argument. I have considered the stuff that you have mentioned before in the case in chief. I have given it long and hard consideration and I am not going bore anybody with my thoughts on every piece of evidence except to say it is inherently unreliable. It is hearsay. And some of it is going to be hearsay upon hearsay, and some of it is going to be conclusion based upon hearsay.
>
> Even if it were offered in its most pristine form, I don't think it rises to the level of lingering doubt, if there is such a concept that applies in this case.
>
> I read **Terry**. **Terry** was a unique case. And while the concept of lingering doubt may be argued as a concept or may have found beyond a reasonable doubt that the defendant was guilty of the crime of killing Ray Wells and the crime of killing Marlene Wells. But if their doubt did not rise to an absolute certainty, excuse me. If their doubt did not exclude all possible doubt, you are free to argue and you are permitted to argue that there is some room

> within reasonable doubt to no doubt at all for the defendant's life to be spared.
>
> But to try to get in this evidence to show to support the argument, I think it's totally unreliable even if offered in its most admissible form. It would be confusing to the jury and doesn't have a tendency to prove anything.
>
> For that reason, the request to get in that evidence is denied."

4. Subsequently, counsel for petitioner requested the following jury instruction:

> "Each individual juror may consider as a mitigating factor residual or lingering doubts as to whether Mr. Sandoval intentionally killed Ray and Marlene Wells.
>
> Lingering or residual doubt is defined as the state of mind between a reasonable doubt and beyond all possible doubts.
>
> Thus, if any individual juror has lingering or residual doubt about whether the defendant intentionally killed Ray and Marlene Wells, you must consider this as a mitigating factor and assign it to [sic] the way you feel as appropriate."

5. The trial court refused to give the above-mentioned instruction. Although counsel argued to the jury the concept of lingering doubt, failure to provide the jury with a legal basis for exercising its right to consider lingering doubt as a mitigating factor effectively precluded the jury from considering this crucial component of petitioner's penalty phase defense.

This error had an substantial and injurious effect or influence in determining the jury's verdict and rendered the penalty phase of Petitioner's trial unfair and unreliable. Accordingly, Petitioner's sentence must be overturned.

XXXIII

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO INSTRUCT THAT THE JURY MAY ONLY FIND OFFENSES OFFERED IN AGGRAVATION TO BE TRUE BY UNANIMOUS VERDICT.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XXXII, above.

Petitioner was deprived of his rights to due process of law, a right to a fair trial, a right to a jury trial, and right not to be subjected to cruel and unusual punishment under the Fifth, Eighth, and Fourteenth Amendments by the trial court's failure to instruct the jury that consideration of criminal acts other than those for which he was convicted, as a factor in aggravation, required a unanimous finding by the jury that petitioner had, in fact, committed such an offense.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. Petitioner's trial counsel requested that the court give the following special instruction as part of its charge to the jury:

> "Evidence has been introduced for the purpose of showing that the defendant, Alfred Arthur Sandoval, has committed a criminal act other than that for which he was convicted which involved the express or implied use of force or violence or the threat of force or violence. Such evidence, if believed, may not be considered by you as an aggravating circumstance in this case unless you are first satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal act. Also, all twelve jurors must agree as to the existence

> of this aggravating factor before it may be considered by you. If the jury does not unanimously agree that the existence of this aggravating factor has been proven, no juror may consider it in reaching their personal penalty verdict.
>
> You may not consider any evidence of any other criminal act as an aggravating circumstance."

2. A rational juror could have entertained a reasonable doubt as to the truth of the allegations concerning petitioner's involvement in other criminal offenses for which evidence was presented at the penalty phase of trial. The trial court's failure to instruct was prejudicial and erroneous. It violated petitioner's right to be presumed innocent of a criminal offense unless and until his guilt is proven beyond a reasonable doubt by a unanimous jury; and it deprived petitioner of the protection of procedures designed to insure the reliability of "other crimes" evidence considered by the jurors.

3. The deprivation of these protections created a constitutionally impermissible risk that the death judgment was unreliable, arbitrary, and capricious in violation of the Eighth and Fourteenth Amendments. The trial court's failure to instruct also arbitrarily deprived petitioner of his state constitutional right to a jury trial on all disputed factual issues and constitutes a violation of his rights under the Fifth, Eight, and Fourteenth Amendments to the United States Constitution.

This error had a substantial and injurious effect or influence in determine the jury's verdict and rendered the penalty phase of petitioner's trial unfair and unreliable. Accordingly, petitioner's sentence must be overturned.

XXXIV

PETITIONER'S DEATH SENTENCE AS IMPOSED IN CALIFORNIA SERVES NO VALID STATE PURPOSE.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XXXIII, above.

Petitioner's death sentence was rendered in violation of his right to be free from the purposeless and unnecessary infliction of pain and suffering as petitioner's death would serve no legitimate state purpose, in violation of petitioner's federal constitutional rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. No family members of Marlene Wells have expressed any opinion in favor of the death penalty for petitioner. The only purpose an execution serves, retribution, is absent in this case.

2. The infrequency with which the death penalty is carried out in the State of California deprives it of any arguable deterrent function and demonstrates that it is not needed as a retributive device. Only four executions have been carried out in California since 1977. California has the largest number of inmates on death row, over 400. The average length of time from sentencing to execution, nationally, is 122 months. Moreover, the estimated cost to taxpayers for 1995's 56 executions was 121 million dollars. California taxpayers spend 90 million dollars a year on the death penalty. By contrast, the cost of keeping an inmate incarcerated under maximum security for 40 years is approximately $500,000.00.

3. A myriad of studies over the last 20 years have demonstrated conclusively that the death penalty has little or no effect on the deterrence of crime. Since no possible appeal purpose is served by the exaction of the death penalty, it has no identifiable deterrent function generally, or in petitioner's case, and is not necessary as a form of retribution, no valid state purpose is served.

Petitioner's sentence of death is therefore arbitrary and capricious and should be reversed.

XXXV
CALIFORNIA'S CAPITAL SENTENCING STATUTE AS APPLIED TO PETITIONER'S CASE WAS UNCONSTITUTIONAL.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XXXIV, above.

Petitioner's sentence of death was rendered in violation of his rights to due process and equal protection, to fairness in the adjudication process, to be free from cruel, unusual, arbitrary and capricious punishment, and to a reliable penalty determination because California's 1978 capital sentencing statute, as applied to petitioner's case, was constitutionally inadequate, in violation of petitioner's federal constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among others to be presented after full investigation, research, analysis, discovery and hearing, include the following:

1. **Penal Code § 190.3** of California's 1978 capital sentencing statute, under which petitioner was tried, allows both the prosecution and the defense to present evidence "as to any matter relevant" to aggravation, mitigation, sentencing, including, but not limited to, "the nature and circumstances of the present offense" and "the defendant's character, background, history, mental condition and physical condition." The statute also contains eleven factors a jury must "take into account," if relevant, in deciding whether to impose death or life imprisonment without the possibility of parole. The statute does not identify or describe these factors as either aggravating or mitigating.

2. As applied, the factors do not genuinely narrow the class of persons eligible for the death penalty and do not reasonably justify the imposition of a more severe sentence on petitioner compared to others found guilty of murder. The factors are so unconstitutionally broad and vague in their

meaning and limitless in their application that they do not provide a sentencing standard capable of promoting a consistent and rational application of the death penalty as applied in Petitioner's case.

3. As applied, the factors listed in **California Penalty Code § 190.3**, individually and in combination, fail to guide the sentencer's discretion and create an impermissible risk of vaguely-defined, arbitrarily and capriciously selected individuals upon whom death is imposed. The statute requires the sentencer to consider a unitary list of actors without any explanation as to which factors, if any, are aggravating or mitigating. As a whole, the statute thus allows the sentencer complete discretion to decide whether and for what reasons a defendant should die, including the power to impose death upon the unconstitutionally impermissible basis of mental impairment. This aspect of the statute alone violates the Eighth Amendment.

4. The California capital sentencing process as applied to petitioner's case resulted in additional constitutional violations including, but not limited to, the following:

(a) The failure to delete inapplicable sentencing factors which was a source of jury confusion and capriciousness.

(b) The failure of the statute and instructions to designate which factors and circumstances were mitigating and which were aggravating.

(c) The use of unadjudicated crimes at the penalty phase.

(d) The failure to find that death was the appropriate sentence beyond a reasonable doubt.

(e) The failure to find that aggravation outweighed mitigation beyond a reasonable doubt.

(f) The failure to find that aggravating circumstances were true beyond a reasonable doubt.

(g) The California death penalty statute is unconstitutional because it does not require (1) written findings

as to the aggravating factors selected by the jury, (2) proof beyond a reasonable doubt of any of the aggravating factors, (3) jury unanimity on aggravating factors, (4) a finding that aggravating factors outweigh mitigating factors beyond a reasonable doubt, (5) a finding that death is the appropriate punishment beyond a reasonable doubt, and (6) a procedure to enable a reviewing court to meaningfully evaluate the sentencer's decision.

(h) The prosecution's re-litigation of the facts underlying petitioner's previous felony conviction, which permitted use of evidence that he had no real opportunity to rebut.

(i) The trial court's failure to instruct the jury that the sentence of life without parole means that the defendant will never be considered for parole, or otherwise correct California jurors' common misunderstanding that life-sentence prisoners may be released.

6. Petitioner's death sentence was thus based on the unguided consideration of the circumstances of the offense, without regard to the definition or reliability of such factors, as well as unbridled consideration of, inter alia, petitioner's age. As applied in petitioner's case, California's 1978 death penalty statute was and is constitutionally inadequate.

XXXVI

IMPOSITION OF THE DEATH PENALTY WAS ARBITRARY AND CAPRICIOUS.

Petitioner incorporates and realleges the allegations of all paragraphs of Claims I through XXXV, above.

Petitioner's sentence of death was rendered in violation of his rights to equal protection and due process, to a fair trial, to be free from arbitrary and capricious sentencing, to an individualized sentencing procedure, to be free from cruel and unusual punishment, and to a fair and reliable penalty determination because the capital punishment system, under which petitioner was sentenced, failed to rationally narrow the

class of death-eligible defendants and allowed improper, over broad, capricious and discriminatory criteria to govern the charging decision with respect to those murder cases in which the death penalty was sought, all of which violated petitioner's federal constitutional rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.

The facts supporting this claim, among those to be presented after full investigation, research, analysis, discovery, and hearing, include the following:

1. To satisfy the requirements of the United States Constitution, "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" **Lowenfield v. Phelps, 484 U.S. 231, 244 (1988)** (quoting **Zant v. Stephens, 462 U.S. 862, 877 (1983)**). This narrowing function may be provided in one of two ways: "The legislature may broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase, . . . or the legislature may itself narrow the definition of capital offenses . . . (citation omitted)." **Id. at 232.**

2. California purports to perform the constitutionally required narrowing at the guilt phase. Accordingly, a defendant is not eligible for the death penalty in California unless he or she is convicted of first-degree murder with at least one special circumstance.

3. In examining the California sentencing system, it is apparent that the "special circumstances" finding does not perform in practice the narrowing function it ostensibly performs on its face. Indeed, the most cursory look at California case law demonstrates that the "special circumstance" narrowing function is illusory. By describing a multitude of different special circumstances which render a defendant eligible for death, California sweeps so broadly that most murderers are subject to the death penalty and only a few excluded.

4. Consequently, the selection of "the class of persons eligible for the death penalty" has fallen into the hands of the various county district attorneys and is subject to differing results because of, inter alia, the subjective pressures of cost considerations, court congestion and bias.

5. A death sentence is unconstitutionally imposed when the circumstances under which it has been imposed create an unacceptable risk that the death penalty may have been meted out arbitrarily or capriciously or through whim or mistake.

6. Petitioner maintains that the "constitutionally necessary" narrowing function that the California death penalty statute purports to perform is in effect performed by the different prosecutors' offices in California. The fundamental problem with that "system" is that the criteria and method used for selecting those to be executed varied significantly from county to county. Petitioner alleges that the lack of uniform application and resulting arbitrariness is outside the acceptable due process limits of the United States Constitution.

The violation of Petitioner's rights was not harmless, rendered the penalty phase fundamentally unfair, and resulted in miscarriage of justice.

PRAYER FOR RELIEF

For the foregoing reasons, petitioner prays for the following relief:

1. That the court issue a Writ of Habeas Corpus to have petitioner brought before it to the end that he may be discharged from his unconstitutional confinement and restraint;

2. That the court issue a Writ of Habeas Corpus to have petitioner brought before it to the end that he may be relieved of his unconstitutional sentence;

3. That the court order discovery on behalf of petitioner, pursuant to Rule 6 of the Rules Governing Section 2254 cases;

4. That the court grant leave, if required, to file and amended petition for Writ of Habeas Corpus to incorporate any newly discovered claims for relief and/or factual allegations;

5. That the court conduct a hearing at which evidence

may be offered concerning the factual allegations in the petition;

6. That if an execution date is set that the court stay petitioner's execution pending final disposition of this petition, pursuant to 28 U.S.C. § 2251;

7. That the court hold this petition in abeyance in the event that the court concludes that state remedies with regard to any claim in this petition have not been exhausted; and

8. The court grant such other relief as may be appropriate to dispose of the matter as law and justice require.

DATED: _____ Respectfully submitted,

Attorneys for Petitioner

/S/
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/S/
MANUEL U. ARAUJO

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Attorneys for Petitioner, ALFRED ARTHUR SANDOVAL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALFRED ARTHUR SANDOVAL	) CASE NO. CV-94-8206-R
	)
	) **[DEATH PENALTY CASE]**
Petitioner,	)
	) **PETITIONER ALFRED**
vs.	) **ARTHUR SANDOVAL'S**
ARTHUR CALDERON,	) **VERIFICATION TO**
as Warden of San Quentin	) **AMENDED PETITION FOR**
State Prison,	) **WRIT OF HABEAS**
	) **CORPUS**
Respondent.	)
_____	)

VERIFICATION

The undersigned declares that he is the Petitioner in the Petition for Writ of Habeas Corpus filed on July 1, 1996; That he has read the Amended Petition and knows the contents thereof; and that the same is true and correct to the best of his

knowledge, information and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 26, day of July 1996 at San Quentin, California.

/S/

Alfred Arthur Sandoval, Petitioner

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 13330 Philadelphia Street, Whittier California 90601. On July 26, 1996. I served the foregoing document(s) described as **DEATH PENALTY OF AMENDED PETITION FOR WRIT OF HABEAS CORPUS** on all parties herein in this action as follows:

___ **By Fax** transmission

_x_ **By placing** ___ the original __XX__ a true copy thereof enclosed in sealed envelopes addressed as follows:

ARTHUR CALDERON, Warden
San Quentin State Prison
San Quentin, California 94964

SHARON WOODEN RICHARD
Asstant Attorney General of California
300 S. Spring Street
Los Angeles, California 90013

_X_ **BY MAIL**:

__X__ I deposited such envelope in the mail at Whittier, California. The envelope was mailed with postage thereon fully prepaid.

____ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, Californai in the ordinary course of business, I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date

or postage meter date is more that one day after day of deposit for mailing in affidavit.

_ **BY PERSONAL SERVICE** – I caused such envelop to be delivered by hand the offices of the addressee. **Proof of Service** to be filed.

__X__ **(State)** I declare under the laws of the State of California that the above is true and correct.

_____ **(Federal)** I declare that I am employed in the office of a member of the Bar of this court at whose direction the service was made.

VERONICA A. TANAHARA _____\S/_____
Name of Declarant Signature of Declarant

APPENDIX J

DEATH PENALTY FILED
OCT 15 1996
CLERK, U.S. DISTRICT COURT
OF CENTRAL DISTRICT OF
CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALFRED SANDOVAL,	) CASE NO. CV-94-8206 R
	) ORDER ON RESPONDENT'S
Petitioner,	) MOTION TO DISMISS
	)
ARTHUR CALDERON,	)
Warden of California State	)
Prison at San Quentin,	)
	)
Respondent.	)

Respondent's Motion to Dismiss came before the Court for hearing on October 15, 1996. Having read and considered the papers in support of, and in opposition to, the motion to dismiss and having heard and considered oral argument, the Court orders as follows:

1. The Court finds that the following claims and subclaims are unexhausted:

32, 33, 34, 35, 36, 2(1)(d-j), 3, 6(2), 8 (as it relates to the exclusion of Mexican-American females).

2. The federal proceedings will be held in abeyance while petitioner exhausts his remedies in state court.

3. The execution of petitioner's sentence of death and all proceedings related thereto, including preparation for execution and the setting of a new execution date, are stayed pending final disposition of this matter.

4. Petitioner shall file a petition for writ of habeas corpus in the California Supreme Court within 30 days of the date of this Order.

5. Petitioner is ordered to file quarterly status reports relating to the status of the state habeas proceedings beginning one week after the state petition is due and every three months thereafter. Petitioner is ordered to notify the Court within 15 days of any judgment issued by the California Supreme Court regarding the state habeas petition.

IT IS SO ORDERED.

Dated: October 15, 1996.

/S/
Manuel L. Real
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No. CV-94-8206-R Date OCT. 15, 1996

Title ALFRED ARTHUR SANDOVAL V. ARTHUR CALDERON, WARDEN

DOCKET ENTRY

PRESENT:

Hon. MANUEL L. REAL, JUDGE

William Horrell — Deputy Clerk

Noreen Cerge — Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
Michael Magnuson	Sharon Wooden Richard

PROCEEDINGS: Respondent's motion to dismiss petition

The Court GRANTS Respondent's motion as to certain non-exhausted claims as stated on the record.

MINUTES FORM II
CIVIL - GEN

Initials of Deputy Clerk W

D-M

DANIEL E. LUNGREN
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Attorneys for Respondent

ENTERED
AUG 31 1998
CENTRAL
DISTRICT COURT
OF CALIFORNIA

FILED
AUG 26 1998
CLERK, U.S. DISTRICT
COURT CENTRAL
DISTRICT CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALFRED ARTHUR SANDOVAL,	) **DEATH PENALTY**) **CASE**) CV-94-8206 -R) [redacted]ORDER
Petitioner	) GRANTING MOTION TO
v.	) STRIKE UNEXHAUSTED) CLAIMS FROM AMENDED
ARTHUR CALDERON, Warden of the California State Prison at San Quentin,	) PETITION FOR WRIT OF) HABEAS CORPUS AND) DENYING MOTION TO) MAINTAIN STAY OF
Respondent.	) FEDERAL PROCEEDINGS
_____	) U.S.D.C. Judge Hon. Manuel L. Real

Respondent's Motion to Strike Unexhausted Claims from Amended Petition for Habeas Corpus and Petitioner's Motion to Maintain Stay of Federal proceedings came on regularly for hearing before this Court on August 24, 1998. Michael S. Magnuson, Esq., appeared as attorney for Petitioner and Deputy Attorneys General Jeffrey B. Kahan and James William Bilderback II appeared as attorneys for Respondent.

After considering the moving papers and opposition papers, arguments of counsel and all other matters presented to the Court, IT IS HEREBY ORDERED that Respondent's Motion to Strike Unexhausted Claims form the Amended Petition for Writ of Habeas Corpus is GRANTED. The following claims are hereby stricken from the Amended Petition for Writ of Habeas Corpus: 32, 33, 34, 35, 36, 2(1) (d-j), 3, 6(2), and 8 (pertaining to the exclusion of Mexican-American females).

IT IS FURTHER ORDERED that Petitioner's Motion to Maintain the Stay of Federal Proceedings is DENIED.

Presented by: /S/
JEFFREY B. KAHAN
Deputy Attorney General

DATED: AUG 26 1998

MANUEL L. REAL HON.
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

DECLARATION OF SERVICE

Case Name: **Alfred Arthur Sandoval v. Arthur Calderon, Warden of the California State Prison at San Quentin**

Case No. : **CV-94-8206-R**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **August 26, 1998**, I placed the attached

[PROPOSED] ORDER GRANTING MOTION TO STRIKE UNEXHAUSTED CLAIMS FORM AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND DENYING MOTION TO MAINTAIN STAY OF FEDERAL PROCEEDINGS

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Manuel U. Araujo, Esq. (SBN 65065)
Law Offices of Manuel U. Araujo
13330 Philadelphia Street
Whittier, CA 90601-4414

Michael S. Magnuson, Esq. (SBN 66680)
Law Offices of Manuel U. Araujo
13330 Philadelphia Street
Whittier, CA 90601-4414

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on **August 26, 1998**, at Los Angeles, California.

-

Edith Marroquin-Obeso /S/
Signature

JBK:emo
LA94XW0006

DANIEL E. LUNGREN
Attorney General of the State of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
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FILED
DEC -3 1998
CENTRAL
DISTRICT COURT
OF CALIFORNIA

ENTERED
CLERK, U.S. DISTRICT
COURT
DEC - 4 1998
CENTRAL DISTRICT
COURT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALFRED ARTHUR SANDOVAL,	) **DEATH PENALTY**) **CASE**) CV-94-8206-R
Petitioner	) [redacted] ORDER
v.	) GRANTING) JUDGMENT ON THE
ARTHUR CALDERON, Warden of the California State Prison at San Quentin,	) PLEADINGS IN FAVOR OF) RESPONDENTS ON) CLAIMS 4, 5, 6, 11, 14, 18,)21, 28, AND 29 OF) AMENDED
Respondent.	) PETITION FOR WRIT OF) HABEAS CORPUS

Hon. Manuel L. Real
United States District Judge

Respondent's Motion for Judgment on the Pleadings on Claims 2, 4, 5, 6, 9, 10, 11, 14, 15, 16, 18, 21, 25, 28, and 29 of Amended Petition for Writ of Habeas Corpus came on for hearing before this Court on November 30, 1998. Michael S. Magnuson, Esq., appeared as attorney for Petitioner and Deputy Attorneys General Kent J. Bullard and James William Bilderback II appeared as attorneys for Respondent.

After considering the moving papers and opposition papers, arguments of counsel and all other matters presented to the Court, IT IS HEREBY ORDERED that Respondent's Motion for Judgment on the Pleadings in GRANTED IN PART AND DENIED IN PART. Judgment is GRANTED in favor of Respondent on claims 4, 5, 6, 11, 14, 18, 21, 28, and 29 of the Amended Petition for Writ of Habeas Corpus; Respondent's Motion for Judgment on the Pleadings is DENIED on claims 2, 9, 10, 15, 16, and 25 of the Amended Petition for Writ of Habeas Corpus.

Presented By: /S/
KENT J. BULLARD
Deputy Attorney General

DATED: DEC -3 1998

MANUEL L. REAL
HON. MANUEL L. REAL
UNITED STATES DISTRICT COURT

DECLARATION OF SERVICE

Case Name: **Alfred Arthur Sandoval v. Arthur Calderon, Warden of the California State Prison at San Quentin**
No. : **CV-94-8206-R**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **December 3, 1998**, I placed the attached

[DEATH PENALTY CASE]
[PROPOSED] ORDER GRANTING JUDGMENT ON THE PLEADINGS IN FAVOR OF RESPONDENTS ON CLAIMS 4, 5, 6, 11, 14, 18, 21, 28, AND 29 OF AMENDED PETITION FOR WRIT OF HABEAS CORPUS

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

MANUEL U. ARAUJO
LAW OFFICES OF MANUEL U. ARAUJO
13330 PHILADELPHIA STREET
WHITTIER, CA 90601-4414

MICHAEL S. MAGNUSON
LAW OFFICES OF MICHAEL S. MAGNUSON
13330 PHILADELPHIA STREET
WHITTIER, CA 90601-4414

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on **December 3, 1998**, at Los Angeles, California.

Marissa G. Ordonez-Legaspi /S/
Signature

JBK:mol
LA1994XW0006

DANIEL E. LUNGREN
Attorney General of the State of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
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Attorneys for Respondent

FILED
DEC 18 1998
CLERK U.S.
DISTRICT COURT
CENTRAL DISTRICT
OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALFRED ARTHUR SANDOVAL,	) **DEATH PENALTY**) **CASE**) CV-94-8206-R
Petitioner	) [redacted]
v.	) ORDER DENYING) PETITIONER'S MOTION
ARTHUR CALDERON, Warden of the California State Prison at San Quentin,	) FOR ORDER VACATING) PRIOR ORDER STRIKING) UNEXHAUSTED CLAIMS,) OR, ALTERNATIVELY,) FOR LEAVE TO AMEND
Respondent.	)HABEAS CORPUS PETITION

Hon. Manuel L. Real
United States District Judge

Petitioner's Motion for Order Vacating This Court's Prior Order Striking Unexhausted Claims from Habeas Corpus Petition or, Alternatively for an Order Granting Leave to Amend Habeas Corpus Petition came on for hearing before this Court on December 14, 1998. Michael S. Magnuson, Esq., appeared as attorney for Petitioner and Deputy Attorney General Kent J. Bullard appeared as attorney for Respondent.

After considering the moving papers and opposition papers, arguments of counsel and all other matters presented to the Court, IT IS HEREBY ORDERED that Petitioner's Motion for Order Vacating This Court's Prior Order Striking Unexhausted Claims from Habeas Corpus Petition or, Alternatively for an Order Granting Leave to Amend Habeas Corpus Petition is DENIED.

Presented by: /S/
KENT J. BULLARD
Deputy Attorney General

DATED: DEC 18 1998

MANUEL L. REAL
HON. MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

DECLARATION OF SERVICE

Case Name: **Alfred Arthur Sandoval v. Arthur Calderon, Warden of the California State Prison at San Quentin**
No. : **CV-94-8206-R**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On December 15, 1998, I placed the attached

[DEATH PENALTY CASE]
[PROPOSED] ORDER DENYING PETITIONER'S MOTION FOR ORDER VACATING PRIOR ORDER STRIKING UNEXHAUSTED CLAIMS, OR, ALTERNATIVELY, FOR LEAVE TO AMEND HABEAS CORPUS PETITION

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

MANUEL U. ARAUJO
LAW OFFICES OF MANUEL U. ARAUJO
13330 PHILADELPHIA STREET
WHITTIER, CA 90601-4414

MICHAEL S. MAGNUSON
LAW OFFICES OF MICHAEL S. MAGNUSON
13330 PHILADELPHIA STREET
WHITTIER, CA 90601-4414

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on December 15, 1998, at Los Angeles, California.

Marissa G. Ordonez-Legaspi /S/
Signature

JBK:mol
LA1994XW0006

BILL LOCKYER, Attorney General
of the State of California
DAVID P. DRULINER
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General
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State Bar No. 174115
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Telephone: (213) 897-2274
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Attorneys for Respondent

FILED
FEB 3 1999
CLERK U.S.
DISTRICT COURT
CENTRAL DISTRICT
OF CALIFORNIA
BY DEPUTY

DEATH PENALTY

ENTERED
CLERK U.S.
DISTRICT COURT
FEB - 4 1999
CENTRAL DISTRICT OF
CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALFRED ARTHUR SANDOVAL,	) **DEATH PENALTY**) **CASE**) CV-94-8206-R
Petitioner	)
v.	) [redacted] ORDER)GRANTING SUMMARY
ARTHUR CALDERON, Warden of the California State Prison at San Quentin,	) JUDGMENT IN FAVOR) OF RESPONDENTS ON) CLAIMS 2(2), 2(3), 9, 10, 15,) 16, AND 25 OF AMENDED) PETITION FOR WRIT OF
Respondent.	) HABEAS CORPUS
	) Hon. Manuel L. Real United States District Judge

Respondent's Motion for Partial Summary Judgment on Claims 2, 9, 10, 15, 16, and 25 of Amended Petition for Habeas Corpus came on for hearing before this Court on February 1, 1999. Michael S. Magnuson, Esq., appeared as attorney for Petitioner and Deputy Attorneys General Jeffrey B. Kahan and James William Bilderback II appeared as attorneys for Respondent.

After considering the moving papers and opposition papers, arguments of counsel and all other matters presented to the Court, IT IS HEREBY ORDERED that Respondent's Motion for Partial Summary Judgment is GRANTED IN PART AND DENIED IN PART. Judgment in GRANTED in favor of Respondent on claims 2 subpart (2), 2 subpart (3), 9, 10, 15, 16, and 25 of the Amended Petition for Writ of Habeas Corpus; Respondent's Motion for Partial Summary Judgment is DENIED as to claim 2 subpart (1) of the Amended Petition for Writ of Habeas Corpus.

Presented by: /S/
JEFFREY B. KAHAN
Deputy Attorney General

IT IS SO ORDERED:

DATED: FEB -3 1999 MANUEL L. REAL
HON. MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

BILL LOCKYER, Attorney General of the
State of California
DAVID P. DRULINER
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General
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Telephone: (213) 897-2274
Fax: (213) 897-6496
Attorneys for Respondent

ENTERED
CLERK OF THE U.S.
DISTRICT COURT
APR - 1 1999
CENTRAL DISTRICT
OF CALIFORNIA
BY DEPUTY

FILED
MAR 31 1999
CLERK U.S.
DISTRICT COURT
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALFRED ARTHUR SANDOVAL,	) CV-94-8206-R
	)
	) [redacted] ORDER
Petitioner	) DENYING CLAIM 2(1)
and	) OF THE AMENDED
	) PETITION FOR WRIT OF
ARTHUR CALDERON,	) HABEAS CORPUS
Warden of the California	)
State Prison at San Quentin,	) **DEATH PENALTY CASE**
	)
	)
Respondent.	)
	)

Claim 2(1) of Petitioner's Amended Petition for Writ of Habeas Corpus came on for evidentiary hearing before this

Court on March 2, and 3, 1999. Manuel Araujo, Esq., appeared as attorney for Petition and Deputy attorneys General Jeffrey B. Kahan and James William Bilderback II appeared as attorneys for Respondent.

After reviewing the relevant portions of the state court record and granting a hearing at which the Court made its own findings on the merits of the issues at hand, IT IS HEREBY ORDERED that claim 2(1) – which alleged that trial counsel provided constitutionally ineffective assistance for failing to investigate and present self-defense evidence as to the murders of Gilbert Martinez and Anthony Aceves, is DENIED.

Presented by: /S/
JEFFREY B. KAHAN
Deputy Attorney General

IT IS SO ORDERED:

DATED: MAR 31 1999

MANUEL L. REAL
HON. MANUEL L. REAL
United States District Judge

BILL LOCKYER, Attorney General of the
State of California
DAVID P. DRULINER
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General
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Los Angeles, CA 90013
Telephone: (213) 897-2274
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Attorneys for Respondent

ENTERED
CLERK OF THE U.S.
DISTRICT COURT
APR - 1 1999
CENTRAL DISTRICT
OF CALIFORNIA
BY DEPUTY

FILED
MAR 31 1999
CLERK U.S.
DISTRICT COURT
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALFRED ARTHUR SANDOVAL,	) CV-94-8206-R
	) [PROPOSED] ORDER
Petitioner	) GRANTING JUDGMENT
and	) ON THE PLEADINGS IN
	) FAVOR OF RESPONDENTS
ARTHUR CALDERON,	) ON CLAIMS 1, 8, 12, 13, 17,
Warden of the California	) 19, 20, 22, 23, 24, 26, 27, 30,
State Prison at San Quentin,	) AND 31 OF THE AMENDED
	) PETITION FOR WRIT OF
	) HABEAS CORPUS
Respondent.	)
	) **DEATH PENALTY CASE**

Respondent's Motion for Judgment on the Pleadings on Claims 1, 7, 8, 12, 13, 17, 19, 20, 22, 23, 24, 26, 27, 30, and 31 of the Amended Petition for Writ of Habeas Corpus came on for hearing before this Court on March 29, 1999. Michael S. Magnuson, Esq., appeared as attorney for Petition and Deputy attorneys General Jeffrey B. Kahan and James William Bilderback II appeared as attorneys for Respondent.

After considering the moving papers, opposition papers, supplemental briefing, and arguments of counsel, as well as all other matters presented to the Court, IT IS HEREBY ORDERED that Respondent's Motion for Judgment on the Pleadings is GRANTED IN PART AND DENIED IN PART. Judgment is GRANTED in favor of Respondent on claims 1, 8, 12, 13, 17, 19, 20, 22, 23, 24, 26, 27, 30, and 31 of the Amended Petition for Writ of Habeas Corpus. Respondent's Motion for Judgment on the Pleadings is DENIED as to claim 7, based on the trial court's failure to sever the trial of count IV of the Information, which charged the murder of Marlene Wells, from the remaining counts of the Information.

Presented By: /S/
JEFFREY B. KAHAN
Deputy Attorney General

IT IS SO ORDERED:

DATED: MAR 31 1999

MANUEL L. REAL
HON. MANUEL REAL
United States District Judge

FILED
APR - 1 1999
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
CLERK U.S. DISTRICT COURT
APR - 2 1999
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALFRED ARTHUR SANDOVAL,	) CV-94-8206-R
	)
	) ORDER GRANTING IN
Petitioner	) PART / DENYING IN PART
v.	) PETITION FOR WRIT OF
	) HABEAS CORPUS
ARTHUR CALDERON,	)
Warden of the California	) **DEATH PENALTY**
State Prison at San Quentin,	)
	)
	)
Respondent.	)
	)

Petitioner Alfred Arthur Sandoval is a prisoner on California's death row. He invoked the jurisdiction of this Court by requesting, pursuant to 21 U.S.C. § 848(q), appointment of counsel to assist him in preparing and litigating a petition for writ of habeas corpus. Currently before the Court is the Petition for Writ of Habeas Corpus filed on July 1, 1996.

Sandoval contends that various constitutional errors

infected the state trial, and that these errors require the Court to reverse either his conviction, his sentence, or both.

On November 16 1998, the Court granted respondent's motion for judgment on the pleadings as to Claims 4, 5, 6, 11, 14, 18, 21, 28 and 29.

On February 3, 1999, the Court granted respondent's motion for summary judgment as to Claims 2(2), 2(3), 3, 9, 10, 15, 16 and 25.

On March 2, 1999, the Court held an evidentiary hearing on Claim 2(1), which alleges that trial counsel were ineffective in failing to conduct an adequate investigation at the guilt phase. After considering the evidence presented at the hearing and in the parties' briefs, the Court finds that trial counsel made a reasonable attempt to locate Eugene Valenzuela to support petitioner's claims of self-defense. The Court finds that petitioner did not inform his attorneys of the identities of the other self-defense witnesses - - Carol Holguin and Daniel Villar. If he had, trial counsel would have made an effort to contact them. In addition, Valenzuela, Holguin, and Villar did not come forward with their information, did not contact trial counsel, and trial counsel were not made aware of the information the witnesses possessed. Petitioner also failed to establish that Holguin and Valenzuela would have been willing to testify at trial. Therefore, trial counsel's guilt phase investigation was not constitutionally deficient. See United States v. Grewal, 825 F.2d 220, 223 (9th Cir. 1987).

The Court also finds that Sandoval suffered no prejudice as a result of trial counsel's failure to locate and call Valenzuela, Holguin, and Villar. Their testimony was either not credible or would not have significantly added to the self-defense evidence introduced at trial. Therefore, Claim 2(1) is DENIED.

On March 29, 1999, the Court granted respondent's motion for judgment on the pleadings as to Claims 1, 8, 12, 13, 17, 19, 20, 22, 23, 24, 26, 27, 30, and 31, and denied the motion as to Claim 7.

In Claim 7, petitioner argues that the Belvedere Park and Wells counts were improperly joined at trial. In analyzing this claim, the Court must ask whether "the trial on a particular count was fundamentally unfair in light of that count's joinder with one or more other charges." Park v. California, 164 F.3d 1226, 1229 (9th Cir. 1999) (quoting Featherstone v. Estelle, 948 F.2d 1497, 1503 (9th Cir. 1991)). The Court finds that Sandoval's trial on the Marlene Wells count was rendered fundamentally unfair by its joinder with the Belvedere Park counts. See Bean v. Calderon, 163 F.3d 1073, 1084 (9th Cir. 1998). Therefore, a writ of habeas corpus shall issue VACATING and SETTING ASIDE Sandoval's conviction for the murder of Marlene Wells in the case of People v. Sandoval, Case No. A760386, unless within 120 days of the entry of judgment herein, the State of California grants Sandoval a new trial on that count. Sandoval's convictions for the murders of Anthony Aceves, Gilbert Martinez, and Ray Wells remain valid. See Bean, 163 F.3d at 1086.

The jury returned a verdict of death only as to the murder of Marlene Wells. Therefore, the sentence of death in this case must also be VACATED and SET ASIDE. The sentence of life without the possibility of parole for the murders of Anthony Aceves, Gilbert Martinez, and Ray Wells remain valid.

IT IS SO ORDERED.

Dated: March 31, 1999.

/S/ Manuel L. Real
United States District Judge

APPENDIX K

United States Court of Appeals,
Ninth Circuit.

Alfred Arthur SANDOVAL, Petitioner-Appellee,
v.
Arthur CALDERON, Warden of the California State Prison at San Quentin,
Respondent-Appellant.
Alfred Arthur Sandoval, Petitioner-Appellant,
v.
Arthur Calderon, Warden of the California State Prison at San Quentin,
Respondent-Appellee.

Nos. 99-99010, 99-99013.

Argued and Submitted June 13, 2000
Filed Nov. 6, 2000

After his convictions for murder and attempted murder and his death sentence were affirmed on direct appeal, 4 Cal.4th 155, 14 Cal.Rptr.2d 342, 841 P.2d 862, petitioner sought federal habeas corpus relief. The United States District Court for the Central District of California, Manuel L. Real, J., granted relief. State and petitioner appealed. The Court of Appeals, Schroeder, Circuit Judge, held that: (1) petitioner was not entitled to severance of charges against him; (2) trial court was not required to question petitioner personally before accepting defense counsel's representation that petitioner would accept library privileges in lieu of self-representation; (3) prosecution's invocation of religious authority during penalty phase of trial violated petitioner's constitutional rights; (4) improper argument warranted federal habeas relief; and (5) petitioner was not entitled to reintroduce previously unexhausted claims into amended petition.

Affirmed in part, reversed in part, and remanded.

Fisher, Circuit Judge, dissented in part and filed a separate opinion.

***1142** Jeffrey B. Kahan, Deputy Attorney General, Los Angeles, California for the respondent-appellant/appellee.

Manuel U. Araujo, Beverly Hills, California and Michael S. Magnuson, Whittier, California for the petitioner-appellee/appellant.

***1143** Appeals from the United States District Court for the Central District of California; Manuel L. Real, District Judge, Presiding. D.C. No. CV-94-08206-R.

Before: SCHROEDER, HAWKINS and FISHER, Circuit Judges.

SCHROEDER, Circuit Judge:

California state prisoner Alfred Arthur Sandoval was convicted of four murders and one attempted murder. He was sentenced to death for one of the murders and to life imprisonment without possibility of parole on the other murder charges. The California Supreme Court affirmed the convictions and, over the dissent of Justice Mosk, the sentences. *See People v. Sandoval,* 4 Cal.4th 155, 14 Cal.Rptr.2d 342, 841 P.2d 862 (Cal.1992). Justice Mosk would have vacated the death sentence and held that the prosecutor's penalty phase summation by its heavy reliance on religious authority in arguing to the jury that the death penalty was sanctioned by God, was not harmless beyond a reasonable doubt. *See id.* at 205, 14 Cal.Rptr.2d 342, 841 P.2d 862 (Mosk, J., concurring and dissenting).

After the California Supreme Court denied Sandoval's petitions for collateral review, the district court granted habeas relief on the ground that the trial for the single murder count on which the death penalty was imposed should have been severed from the trial on the other crimes. The court reasoned that the victim in the former was more innocent than the other victims. The district court otherwise denied relief, and both Sandoval and the State appeal.

We find no constitutional infirmity in Sandoval's convictions. The trial court was not required to sever any counts in this case. The district court therefore erred in granting the writ on severance grounds. We also reject Sandoval's claim that he was denied his right to represent himself under *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The trial court did not err in accepting defense counsel's representation that Sandoval would accept library privileges in lieu of representing himself at trial.

Although we find Sandoval's challenges to his convictions to be without merit, we do hold that Sandoval is entitled to habeas relief from his death sentence. Sandoval was denied a fair penalty phase trial by the prosecutor's closing argument that invoked divine authority and paraphrased a well known Biblical passage as support for imposition of the death penalty.

BACKGROUND

Sandoval was convicted of two sets of crimes. The first set occurred in Belvedere Park in Los Angeles during a gang-related fight in the early morning hours of October 14, 1984. At the guilt phase of the trial, three witnesses testified that Sandoval, a member of the Arizona Marivilla gang, shot Gilbert Martinez and Anthony Aceves in the head at close range. He also shot Manuel Torres in the neck, but Torres did not die from the wound. The victims were all members of the

Mariana Marivilla gang.

About two weeks later, on October 31, 1984, Ray and Marlene Wells were shot to death in their home. Forensic evidence showed that Ray, like Martinez and Aceves, was shot "execution style" in the head at close range. Marlene was shot from a greater distance. At trial, the Wellses' neighbor testified that he heard shots the night of the murders and saw the silhouette of a medium- sized person with slicked-back hair, leave the house. He also noticed a dark Chevrolet parked near the Wellses' home. He initially thought the car was an Impala, but after consulting one of his car books, determined that the car was a 1968 Caprice.

Benjamin Verduzco, a long-time friend of Sandoval's, testified that Sandoval hid the car he drove the night of the Belvedere Park murders in Verduzco's garage. One morning while Sandoval was at Verduzco's house, Ray and Marlene Wells visited the house. Later the same day, the police ***1144** impounded the car Sandoval had hidden at Verduzco's house. The Wellses were killed a few days later.

The night of the Wells murders, Verduzco received a call from Sandoval during which Sandoval told him that he "just did the big mouth in." When Verduzco questioned who the "big mouth" was, Sandoval asked him if he remembered "the one who was there in the morning with the car" and used the name "R." Sandoval also told him that he "had to do her, too" because she saw him kill "R."

The State also put on evidence that connected Sandoval to the car observed at the Wells murder site. On October 7, 1984, a black 1968 Caprice in good condition matching the description of the car at the murder scene was stolen from the Los Angeles zoo parking lot. Sandoval bought a run-down 1968 Chevy Caprice sometime in October 1984. Police later found the

stolen car at the Mexican border at Tecate with a license plate and vehicle identification number with a "pink slip" in the name of the previous owner of the Caprice sold to Sandoval. The driver of the stolen car was a member of the Arizona Marivilla gang.

The jury found Sandoval guilty of four counts of first degree murder and one count of attempted murder. It also found true the special circumstances of multiple murder within the meaning of California Penal Code Section 190.2(a)(3), making Sandoval eligible for the death penalty.

During the penalty phase of the trial, the State presented aggravating evidence about Sandoval's behavior, including witness testimony about specific events demonstrating Sandoval's history of violence. In mitigation, Sandoval presented testimony from friends and family members who described his abused childhood and his commitment to his family, his positive contributions to his community, and his service as a prisoner trustee.

During the prosecutor's summation to the jury, he argued that Sandoval should be put to death for the murders. In urging the jury to return death verdicts, the prosecutor relied heavily on religious authority as commanding capital punishment for Sandoval's crimes.

The jury deliberated for three and a half days before notifying the trial judge that it was irretrievably deadlocked. After the judge returned the jury to its deliberations, it reached a verdict after one hour and forty minutes. It concluded that Sandoval should be sentenced to death for the murder of Marlene Wells and to life without possibility of parole for the other murders. The convictions were affirmed on appeal. *See People v. Sandoval,* 4 Cal.4th 155, 14 Cal.Rptr.2d 342, 841 P.2d 862 (Cal.1992). The Supreme Court granted certiorari to consider

whether California's "reasonable doubt" jury instruction violated due process. The Court upheld the instruction. *See Victor v. Nebraska,* 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).

Sandoval filed a petition for a writ of habeas corpus with the California Supreme Court raising several challenges to his convictions and sentences. The court denied the petition on the merits in an unpublished order. Sandoval then, on July 1, 1996, filed a federal habeas petition which he amended on July 29, 1996. In an effort to exhaust some of the claims in his federal petition, Sandoval also filed a second habeas petition in the California courts.

The district court originally stayed the federal petition pending exhaustion of state remedies. It declined to extend the stay, however, and granted the State's motion to strike Sandoval's unexhausted claims. Meanwhile, the Supreme Court of California denied some of the claims in Sandoval's second petition on the merits and found the rest of the claims procedurally barred.

With respect to the exhausted claims, the district court dismissed several of Sandoval's claims on the pleadings, including his claim that he was erroneously denied the right to represent himself, that a mistrial should have been declared after the penalty phase trial on account of jury ***1145** deadlock, and that improper prosecutorial argument denied him a fair penalty phase trial. The court granted summary judgment to the State on each of Sandoval's remaining claims, except his claim that the trial court should have severed the Belvedere Park counts from the Wells counts at trial. The district court found that the conviction and sentence for the murder of Marlene Wells was constitutionally infirm because the trial court should have severed her count from the other counts on the ground that she was not tied to any gang or other illegal

activity and hence was an innocent victim. The court did not dispute the State's contention, however, that all of the shootings would be admissible in a separate trial for the murder of Marlene Wells. Finding that Sandoval was prejudiced by the joinder only on the Marlene Wells count, the court denied the writ as to the remaining convictions and sentences.

APPLICABILITY OF AEDPA

[1][2] Before turning to the merits of these appeals, we must first determine whether the provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), apply to this case. AEDPA's provisions for federal review of state prisoner petitions do not apply to cases that were pending prior to its effective date, April 24, 1996. *See Lindh v. Murphy,* 521 U.S. 320, 327, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). On December 7, 1994, Sandoval had filed a motion with the district court for appointment of counsel and for a stay of execution in order to prepare a habeas petition. We have held that such a filing is sufficient to create a "pending" case for AEDPA purposes. *See Calderon v. United States District Court,* 163 F.3d 530, 540 (9th Cir.1998) (en banc), *cert. denied,* 526 U.S. 1060, 119 S.Ct. 1377, 143 L.Ed.2d 535 (1999). Therefore, pre-AEDPA law governs our review.

The State nevertheless contends that the expedited procedures of AEDPA's Chapter 154, 28 U.S.C. §§ 2261-66 (West Supp.2000) apply in this case. In contrast to § 2254, Chapter 154 applies to cases that were pending at the time AEDPA was signed into law. Chapter 154 creates a quid pro quo arrangement whereby states that meet certain statutory requirements for unitary review and appointment of counsel are entitled to limit federal habeas litigation to petitions filed within 180 days after state court proceedings are completed. *See* 28 U.S.C. § 2263(a).

The State argues that California's unitary review system qualifies for Chapter 154's expedited review procedures. We have already rejected this claim. *See Ashmus v. Woodford,* 202 F.3d 1160, 1165 (amended opinion) (holding that, at least until January 1, 1998, California's unitary review scheme did not comply with the eligibility requirements of Chapter 154 and that the state therefore could not avail itself of the procedural advantages of that Chapter), *cert. denied,* --- U.S. ----, 121 S.Ct. 274, 148 L.Ed.2d 199 (2000).

We also reject the State's argument that *Ortiz v. Stewart,* 149 F.3d 923 (9th Cir.1998) *cert. denied* 526 U.S. 1123, 119 S.Ct. 1777, 143 L.Ed.2d 806 (1999), requires us to apply AEDPA. In *Ortiz,* we held that a petitioner was barred from adding, post-AEDPA, a new claim that could have been raised in his pre-AEDPA petition. *See id.* at 944. Here, Sandoval did not add any new claims to his pre-AEDPA petition. All of his present claims are pre-AEDPA for our purposes.

SEVERANCE

The parties spend a great deal of time debating whether any claim that the Marlene Wells murder count should have been severed from the remaining charges was properly before the district court when it ruled such severance was required. The State takes the position that it was not, because Sandoval moved to sever both of the Wells murder counts from the Belvedere Park counts. We need not parse the petitioner's contentions so finely because ***1146** we conclude that due process did not require a separate trial on any of the counts.

Before trial, Sandoval twice moved to sever the Belvedere Park charges from the Wells murder charges. His principal argument was that evidence for each of the two sets of crimes lacked cross-admissibility. The trial court denied both motions. It noted that the prosecution's theory of the case was

that the Wells killings occurred because of the Belvedere Park killings. It found that if the prosecutor came forward with evidence linking the two crimes, the evidence would be cross-admissible. Based upon the prosecutor's assurances that Benjamin Verduzco's testimony would provide that evidentiary link, the court denied the severance motions. The testimony did provide that link.

[3][4][5] On habeas review of a prisoner's challenge to a trial court's failure to sever trial of some counts in an indictment, we may only grant the writ if the joinder resulted in an unfair trial. There is no prejudicial constitutional violation unless "simultaneous trial of more than one offense ... actually render[ed] petitioner's state trial fundamentally unfair and hence, violative of due process." *Featherstone v. Estelle,* 948 F.2d 1497, 1503 (9th Cir.1991). This prejudice is shown if the impermissible joinder had a substantial and injurious effect or influence in determining the jury's verdict. *See Bean v. Calderon,* 163 F.3d 1073, 1086 (9th Cir.1998), *cert. denied,* 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999).

[6][7] We have recognized that the risk of undue prejudice is particularly great whenever joinder of counts allows evidence of other crimes to be introduced in a trial where the evidence would otherwise be inadmissible. *See United States v. Lewis,* 787 F.2d 1318, 1322 (9th Cir.1986). Undue prejudice may also arise from the joinder of a strong evidentiary case with a weaker one. *See id.; Bean,* 163 F.3d at 1085. The reason there is danger in both situations is that it is difficult for a jury to compartmentalize the damaging information. *See Bean,* 163 F.3d at 1084.

Our review of the record in this case leads us to conclude that Sandoval was not actually prejudiced by the joinder of the Wells counts with the Belvedere Park counts. The Belvedere Park crimes would have been admissible in a separate Wells

crimes trial and the evidence of Sandoval's guilt for the Wells crimes was not significantly weaker than the evidence for the Belvedere Park crimes.

The State alleged that Sandoval murdered the Wellses because he believed Ray Wells told the police that the car Sandoval used in the Belvedere Park murders was hidden in Verduzco's garage. Thus, evidence of the Belvedere Park murders would have been admissible in a separate trial on the Wells murders to prove motive and identity. *See* Cal. Evid.Code § 1101(b) (West.2000) ("Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."); *see also* Fed.R.Evid. 404(b). Similarly, evidence about the Wells crimes would have been admissible in a Belvedere Park crimes trial. The crimes are linked by Sandoval's car and Verduzco's testimony and because they had a similar modus operandi. Evidence of the separate killings would also have been admissible in both trials to establish the State's allegations of multiple murder special circumstance. *See* Cal.Penal Code § 190.2(a)(3). This cross-admissibility dispels the prejudicial impact of joining all counts in the same trial. *See United States v. Johnson,* 820 F.2d 1065, 1070-71 (9th Cir.1987); *People v. Mason,* 52 Cal.3d 909, 934, 277 Cal.Rptr. 166, 802 P.2d 950 (Cal.1991). The jury would have heard the evidence in any event.

***1147** [8] Nor is this a case where the State joined a strong evidentiary case with a much weaker case in the hope that the cumulation of the evidence would lead to convictions in both cases. Such joinder is improper. *See Bean,* 163 F.3d at 1085.

The State's case against Sandoval for the Belvedere Park crimes was strong. Three eyewitnesses testified that they saw Sandoval shoot the victims. One of the defense's own witnesses admitted during a heated cross-examination that he saw Sandoval at the park that night around the time of the shootings. Defense counsel admitted during closing argument that Sandoval hid his car in Verduzco's garage and fled.

The State's case against Sandoval for the Wells murders was also strong. Prosecution witnesses linked the car at the murder scene to Sandoval and Verduzco's testimony incriminated Sandoval directly. Sandoval points out that the defense impeached Verduzco by establishing that his testimony had been inconsistent at times, that he had several prior convictions, and that he was testifying in exchange for $600 a month, a new identity, and early release from prison. The issue of credibility was, however, for the jury and it ultimately credited Verduzco's testimony.

Given the strength of the State's case against Sandoval on both sets of crimes, and the cross-admissibility of the evidence on each set, we conclude that Sandoval's trial was not actually prejudiced by the joinder. In so holding, we reject Sandoval's argument that we must reach the same result as reached in *Bean*. *Bean* involved the joinder of a strong evidentiary case with a relatively weak one and the use of evidence that was not cross- admissible for both sets of crimes. 163 F.3d at 1084-85.

[9] We also reject the district court's finding that Sandoval was prejudiced by the trial court's failure to sever the Marlene Wells count from the remaining counts. The district court held that severance was required because Marlene Wells was an innocent victim and the other victims were all of questionable character. Yet, Marlene Wells was killed at the same time, in the same place, and with the same weapon as her husband, Ray. Moreover, the trial judge had no way of knowing at the time of

the pre-trial severance motion that the evidence would eventually show that Marlene Wells was more innocent than the other victims. There was no error, let alone prejudicial error rising to the level of a constitutional violation, in trying the Wells murder counts jointly.

SELF-REPRESENTATION

Sandoval also contends that he is entitled to a new trial because he was denied his right to represent himself under *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). *Faretta* established a defendant's right to self-representation, provided that the defendant knows of its disadvantages and voluntarily waives counsel.

Sandoval's pretrial motion to represent himself was calendared for hearing before the original trial judge assigned to his case. At the hearing, that judge lectured Sandoval on why self-representation was a bad idea, and counseled Sandoval to accept the help of his lawyers. Sandoval stated that he had already given the idea considerable thought, but the judge delayed ruling on the motion to give Sandoval a week to consider his advice. Sandoval's case was then transferred to another judge.

At a pretrial meeting with the new judge, counsel had a conference at the sidebar to discuss certain matters. The sidebar proceedings were not audible to Sandoval. At this conference, according to Sandoval's verified habeas petition, defense counsel advised the judge that there was a pending *Faretta* motion, but that Sandoval would be satisfied with library privileges instead of self-representation. These were granted. Sandoval alleges that his lawyer's statement to the judge that he was really after library privileges was not accurate. He claims that if he had known that counsel bargained his *Faretta* rights for library privileges he would have

protested.

***1148** [10] The issue for our decision is whether the trial court erred in accepting counsel's representation that Sandoval would be satisfied with library privileges in lieu of self-representation and was instead constitutionally required to question the defendant personally as to whether he was willing to accept counsel's continued assistance at trial. If a personal colloquy was required, we must remand for an evidentiary hearing. We hold, however, that it was not.

[11][12] A criminal defendant has a right to self-representation at trial, provided that the defendant is fully informed about the consequences of such action and then knowingly waives the benefits of legal counsel. *See id.* at 835, 95 S.Ct. 2525. This right, however, occupies no hallowed status similar to the right to counsel enshrined in the Sixth Amendment. While the right to counsel attaches unless affirmatively waived, the right to self-representation does not attach until asserted. *See Adams v. Carroll,* 875 F.2d 1441, 1444 (9th Cir.1989) ("The right to the assistance of counsel is automatic; ... [t]o exercise the right to self-representation, on the other hand, a criminal defendant must negotiate a number of procedural obstacles."); *Brown v. Wainwright,* 665 F.2d 607, 610 (5th Cir.1982) ("In the absence of a clear and knowing election, a court should not quickly infer that a defendant unskilled in the law has waived counsel and has opted to conduct his own defense."); *see also United States v. Teague,* 953 F.2d 1525, 1538 & n. 4 (11th Cir.1992) (en banc) (Birch, J., concurring in the result) (discussing the preeminence of the right to counsel); *Tuitt v. Fair,* 822 F.2d 166, 174 (1st Cir.1987) ("Where the two rights are in collision, the nature of the two rights makes it reasonable to favor the right to counsel which, if denied, leaves the average defendant helpless."); *United States v. Weisz,* 718 F.2d 413, 425-26 (D.C.Cir.1984) (citing *Brown*).

[13] Because invocation of the right to self-representation entails a concomitant forfeiture of the important benefits offered by the right to counsel, our cases have come to recognize certain limitations on a defendant's right to self-representation. A defendant may not invoke the *Faretta* right if the *Faretta* demand is untimely, equivocal, made for the purpose of delay, or is not knowingly and intelligently made. *See United States v. Schaff*, 948 F.2d 501, 503 (9th Cir.1991). Moreover, the Supreme Court has limited *Faretta* in material respects in the years since it was decided. Last Term, the Court held that *Faretta* does not extend to a criminal defendant on direct appeal from a criminal conviction. *See Martinez v. Court of Appeal of California*, 528 U.S. 152, ----, 120 S.Ct. 684, 687, 145 L.Ed.2d 597 (2000). In the trial context, the Court has held that there is no absolute bar to standby counsel's unsolicited participation in a trial of a self-representing defendant. *See McKaskle v. Wiggins*, 465 U.S. 168, 176-77, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). In *McKaskle*, the petitioner claimed "that the *Faretta* right will be eviscerated if [court-appointed standby] counsel is allowed to argue with the defendant, make motions to the court contrary to the defendant's wishes, and take other steps not specifically approved by the defendant." *Id.* at 177, 104 S.Ct. 944. He urged the Court to adopt the Fifth Circuit's rule "that court-appointed standby counsel is to be seen, but not heard." *Id.* at 173, 104 S.Ct. 944 (internal quotation marks omitted). The Court rejected those arguments.

[14] Thus, in light of the disfavored status the right to self-representation enjoys vis-a-vis the right to counsel, there is no rule that a defendant who has once expressed a desire for self-representation must be cautioned or addressed personally before receiving the assistance of counsel. The law is to the contrary. It is the defendant who wishes to waive counsel who must be addressed personally before being permitted to represent him or herself. *See Faretta*, 422 U.S. at 835, 95 S.Ct. 2525; *United States v. Arlt*, 41 F.3d 516, 520 (9th Cir.1994).

This colloquy enables ***1149** the trial court to advise the defendant of the numerous benefits of counsel and attendant pitfalls of self-representation. *See Faretta,* 422 U.S. at 835, 95 S.Ct. 2525. After engaging in this discussion with the defendant, the trial court should not then be put in the position of suggesting even indirectly to a criminal defendant that he or she would benefit from self- representation. Yet such a suggestion would be difficult to avoid if the trial court were required to question a criminal defendant personally as to whether he or she really wanted to retain the assistance of counsel, despite counsel's statements that the defendant had withdrawn a *Faretta* request. The trial court therefore did not err in accepting, without personally addressing Sandoval, defense counsel's representation that Sandoval would accept library privileges in lieu of self-representation.

[15] Another Circuit has already expressly recognized this principle. In *Brown v. Wainwright,* the former Fifth Circuit found that once defendants appear through their attorneys the law does not require the court to inform defendants personally of their right to represent themselves. 665 F.2d at 612. The *Brown* court specifically rejected the claim that a trial judge is constitutionally required to engage in a personal colloquy with the defendant to ensure that the defendant has knowingly and voluntarily withdrawn his or her *Faretta* demand. *Id.* We agree with that court that, while advisable in some cases, a personal dialogue between the court and the defendant is not required where circumstances indicate that the defendant has changed his or her mind about self-representation. *See id.*

PROSECUTORIAL INVOCATION OF GOD'S AUTHORITY

At the close of the penalty phase trial, the prosecutor argued to the jury that the death penalty was sanctioned by God. [FN1] His ***1150** argument paraphrased Romans 13:1-5, a passage from the Bible's New Testament commonly understood as

providing justification for the imposition of the death penalty. *See* Robert Parham, *Please Stop Using the Scriptures as Rationale for Capital Punishment, The Tennessean,* Apr. 13, 2000; Larry Swindell, *Capital Idea: A Persuasive Examination-and Denunciation-on the Death Penalty, Fort Worth Star- Telegram,* Nov. 23, 1997; Robert Marquand, *Death Penalty Issue Stirs Divergent Religious Views, McVeigh Case Inspires Debate on Moral Aspects of Society's Ultimate Sanction, Christian Science Monitor,* June 12, 1997. The prosecutor told the jurors that God sanctioned the death penalty for people like Sandoval who were evil and have defied the authority of the State. He explained that by sentencing Sandoval to death, the jury would be "doing what God says." The prosecutor added that imposing the death penalty and destroying Sandoval's mortal body might be the only way to save Sandoval's eternal soul.

> FN1. The prosecutor argued:
> I want to respond to some of the things argued by [defense counsel]. He told you that it's absurd to talk about life and death, that the law is absurd, that you are playing God, that it's revenge. And that is to get you, of course, to vote for life without the possibility of parole. Well, death is a legitimate means of punishment in this state. It's available in this state. You are called upon to impose it if you think it's appropriate. You are a cross section of the community. People are judged by a jury of their peers. You make that determination whether the defendant should get the death penalty or life without the possibility of parole. The defense wants to make that burdensome for you. Each and everyone of you from here on must live with that decision. Push that button over there. You must live with that decision for the rest of your life.
> Well, if it wasn't you called upon to carry out the will of the people of the state of California, it would have been another jury, because that's our system. That's how the

law is affected [sic] in this state.
Don't once think that you have to feel burdened and depressed because I voted for death. You are doing what the law says if it's substantial, the aggravation substantially outweighs the mitigation. Don't listen to this lawyer talk. You will hear lingering doubt. You will hear other antics and whatever [defense counsel] is going to come up with [in rebuttal]. I won't be responding probably, but you can't lose focus. Don't feel guilty about what your decision is. *[Defense counsel] says don't play God. Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an avenger who brings wrath upon one who practices evil.*
You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right.
...Don't be fooled by what's to come [in defense's rebuttal]. Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority.

[16] Sandoval claims that the prosecutor's use of this argument denied him a fair penalty phase trial. We agree with Sandoval that the argument was both improper and highly prejudicial.

[17][18][19] The prosecutor's argument frustrated the purpose

of closing argument, which is to explain to the jury what it has to decide and what evidence is relevant to its decision. *See United States v. Iglesias,* 915 F.2d 1524, 1529 (11th Cir.1990). The jury's decision is to be based upon the evidence presented at trial and the legal instructions given by the court. *See Chandler v. Florida,* 449 U.S. 560, 574, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981) ("Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."). Argument urging the jury to decide the matter based upon factors other than those it is instructed to consider is improper. We have therefore condemned argument that is inflammatory or appeals to bias or prejudice. *See e.g., Bains v. Cambra,* 204 F.3d 964, 974-75 (9th Cir.2000) (finding that the prosecutor's inflammatory argument invited the jurors "to give into their prejudices and to buy into the various stereotypes that the prosecutor was promoting"); *see also Cunningham v. Zant,* 928 F.2d 1006, 1020 (11th Cir.1991) (noting that the prosecutor's comparison of the defendant to Judas Iscariot and other comments improperly appealed to the jury's passions and prejudices and sought to inflame and misinform the jury); ABA Standards for Criminal Justice § 3-5.8(c)-(d) (3d ed. 1993) ("The prosecutor should not make arguments calculated to appeal to the prejudices of the jury ... [and] should refrain from argument which would divert the jury from its duty to decide the case on the evidence."). Similarly, any suggestion that the jury may base its decision on a "higher law" than that of the court in which it sits is forbidden. *See Jones v. Kemp,* 706 F.Supp. 1534, 1558-59 (N.D.Ga.1989); *Commonwealth v. Chambers,* 528 Pa. 558, 599 A.2d 630, 644 (Pa.1991). The obvious danger of such a suggestion is that the jury will give less weight to, or perhaps even disregard, the legal instructions given it by the trial judge in favor of the asserted higher law.

[20] In a capital case like this one, the prosecution's invocation of higher law or extra-judicial authority violates the Eighth

Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict. *See Godfrey v. Georgia,* 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (holding that capital sentencing statutes must "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death") (internal citations and quotation marks omitted). The Biblical concepts of vengeance invoked by the prosecution here do not recognize ***1151** such a refined approach. *See Jones,* 706 F.Supp. at 1559-60; *cf. Tison v. Arizona,* 481 U.S. 137, 180-81, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (Brennan, J., dissenting) (noting the "crude proportionality of 'an eye for an eye' "); *Coker v. Georgia,* 433 U.S. 584, 620, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (Burger, C.J., dissenting) ("As a matter of constitutional principle, [the Eighth Amendment proportionality] test cannot have the primitive simplicity of 'life for life, eye for eye, tooth for tooth.' ").

Argument involving religious authority also undercuts the jury's own sense of responsibility for imposing the death penalty. The Supreme Court has disapproved of an argument tending to transfer the jury's sense of sentencing responsibility to a higher court. *See Caldwell v. Mississippi,* 472 U.S. 320, 330-34, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (holding that a prosecutor's argument that the jury's capital sentencing decision was not final because it would be reviewed by an appellate court unconstitutionally encouraged the jury to delegate its feeling of responsibility for the defendant's sentence to the appellate court). A fortiori, delegation of the ultimate responsibility for imposing a sentence to divine authority undermines the jury's role in the sentencing process.

[21] The Establishment Clause of the First Amendment also

requires us to be especially vigilant in guarding against religious argument. When the State invokes Biblical teachings to persuade a jury, there is, at the very least, the appearance of state endorsement of those teachings. *Cf. Lynch v. Donnelly,* 465 U.S. 668, 687-88, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring). Similar Establishment Clause concerns are present in the Supreme Court's decisions finding public school prayer unconstitutional. *See Santa Fe Independent School Dist. v. Doe,* 530 U.S. 290, 120 S.Ct. 2266, 2280-81, 147 L.Ed.2d 295 (2000); *Lee v. Weisman,* 505 U.S. 577, 593-97, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).

For these reasons, religious arguments have been condemned by virtually every federal and state court to consider their challenge. *See Coe v. Bell,* 161 F.3d 320, 351 (6th Cir.1998); *Bennett v. Angelone,* 92 F.3d 1336, 1346 (4th Cir.1996); *Cunningham,* 928 F.2d at 1019-20; *United States v. Giry,* 818 F.2d 120, 133 (1st Cir.1987); *Chambers,* 599 A.2d at 644; *People v. Eckles,* 83 Ill.App.3d 292, 38 Ill.Dec. 934, 404 N.E.2d 358, 365 (Ill.App.1980); *State v. Wangberg,* 272 Minn. 204, 136 N.W.2d 853, 854-55 (Minn.1965).

Our nation's courts are not alone in rejecting religious argument. The Ontario Court of Appeal has as well. The Canadian Constitution does not recognize the separation of church and state. *See e.g.* Canadian Constitution Act of 1982, Part 1, Canadian Charter of Rights and Freedoms ("Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law...."). Yet the Canadian court found counsel's references to Biblical stories to be "inappropriate in the extreme." *R. v. Finta,* [1992] 53 O.A.C. 1, 1992 Carswell Ont. 96 at ¶ 250.

[22] We thus agree with the Supreme Court of California's own conclusion that the prosecutor's argument in this case was improper and was not merely fair response to comments in

defense counsel's closing argument. Defense counsel used the phrase "playing God" and referred to "an eye for an eye" in the context of a secular argument against vengeance. [FN2] Defense ***1152** counsel did not invoke religious authority to support the result he advocated.

> FN2. In relevant part, defense counsel stated:
> Revenge? That's really what we're talking about. When you convicted Mr. Sandoval of these four murders and found the special circumstances to be true, you already guaranteed one thing. Fred Sandoval will die in the penitentiary is one of them in the state of California. Period. He will never come out. He will die in the penitentiary.
> The question is is he going to die whatever it is in three years in the gas chamber or is he going to die of old age in the pen or is he going to die because someone stabs him in the back in the penitentiary? But the reality is that he is going to die in the penitentiary. That's already been decided and you decided that.
> And in facing you again and thinking about that and thinking about how hard your job is, how difficult your job is, in reality you could sit, play God to an individual. I have to look you in the eye again and I want to know. I have been waiting. I respect your decision. ...
> I have come to grasp it now. I looked at you in the eye an you can look back at me. Doesn't change anything. Nothing will bring back Anthony Aceves and Gilbert Martinez and the two Wells. Nothing. Won't change. Bottom line is revenge. Just pure and simple. Vengeance.
> If that's what you want, that's what you feel, push the button. An eye for an eye, a tooth for a tooth, a stripe for a stripe, a life for a life.
> ...
> He has a chance for doing some good. Anything that you

> do. I don't think society requires revenge. I don't think that you require revenge. An eye for an eye.
> Ghandi said we do this eye for an eye thing, make society require it and do it, what happens is the whole world becomes blind. The light is shut out. That's not right. Don't shut out the light. Don't make the world blind. Don't push that button.

[23][24] Our finding of constitutional error does not end the inquiry, however. To warrant habeas relief, Sandoval must show that the prosecutor's improper argument " 'had [a] substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht v. Abrahamson,* 507 U.S. 619, 638, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (quoting *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). The prosecutor's allusion to Scripture must have prejudiced Sandoval's chances of receiving life without possibility of parole instead of the death penalty.

While we agree with the California Supreme Court that the prosecutor's argument was improper, we disagree with the majority's conclusion that the argument was harmless. We need not decide whether a prosecutor's invocation of religious authority during the penalty phase of a capital case is prejudicial per se, as at least one state court has held. *See Chambers,* 599 A.2d at 644; *see also* Brian C. Duffy, Note, *Barring Foul Blows: An Argument for a Per Se Reversible-Error Rule for Prosecutors' Use of Religious Arguments in the Sentencing Phase of Capital Cases,* 50 Vand. L.Rev. 1335 (1997) (arguing that a per se reversible error rule is required when prosecutors invoke religious authority to a jury in support of the death penalty because the traditional contextual analysis underestimates the prejudicial effect and discounts the constitutional nature of the misconduct). *But see* Elizabeth A. Brooks, Note, *Thou Shalt Not Quote the Bible: Determining the Propriety of Attorney Use of Religious Philosophy and*

Themes in Oral Arguments, 33 Ga. L.Rev. 1113 (1999) (claiming that a per se prejudice rule is unworkable and undesirable). We conclude that the prosecutor's remarks actually prejudiced Sandoval.

We examine the likely effect of the statements in the context in which they were made. *See Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *Bennett,* 92 F.3d at 1346-47. The prosecutor's language in this case was eloquent, powerful, and unmistakably Biblical in style. The core of his remarks bears repeating here:

> Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an avenger who brings wrath upon one who practices evil.

***1153** This was strong medicine. The lay juror would readily understand the words as referring to Scripture. The message was clear: those who have opposed the ordinance of God should fear the sword-bearing state, whose task, as an avenging minister of God, is to bring wrath upon those who, like Sandoval, practice evil.

Those learned in the New Testament would recognize the argument as closely following the thirteenth chapter of the Book of Romans. The chapter reads in relevant part:

> *Submission to the Authorities*
>
> 1 Everyone must submit himself to the governing

> authorities, for there is no authority except that which God has established. The authorities that exist have been established by God.
> 2 Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves.
> 3 For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and he will commend you.
> 4 For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer.
> 5 Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also because of conscience.

13 *Romans* 1-5 (NIV Study Bible 10th Anniversary Ed.).

Having thus cloaked the State with God's authority, the prosecutor then referenced the words used by defense counsel and refuted them by further invocation of religious command: "You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right.... Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."

There could be no clearer an invocation of divine authority to direct a jury's verdict. Defense counsel objected to the argument, but the objection was overruled and no curative instruction given.

This is not a case where the evidence overwhelmingly supported the jury's verdict. The issue was life or death and the

jury was sharply divided. After over three days of deliberations, the jury informed the trial judge that it was hopelessly deadlocked. It was divided 6-6 on two of the counts and 7-5 on the other two. In response to the judge's question whether the jury could possibly reach a result if it deliberated further or perhaps had portions of the transcript read back to it, each juror individually answered "no". Upon being returned to its deliberations, the jury took only an hour and forty minutes to go from a deadlock to four unanimous verdicts.

We do not know what actually happened in the jury room, but we cannot assume that the prosecutor's religious argument did not persuade at least one of the jurors to change a vote for life to death on the Marlene Wells count. The evidence in aggravation was countered with considerable mitigating evidence. That the jury deadlocked evenly after deliberating over three days exemplifies the difficulty of the sentencing decision.

The State argues that a finding of prejudice here would be out of step with cases from our sister circuits that have considered similar prosecutorial argument to be harmless error. There is no discord, for the cases are very record-specific.

In *Bennett v. Angelone,* for example, the Fourth Circuit held that a prosecutor's religious argument was error, but that, in light of the total context of the trial, the error did not render the defendant's trial unfair. 92 F.3d at 1346. In that case, the prosecutor told the jury that " 'Thou shall [sic] not kill' is a proscription against an ***1154** individual; it is not against Government. Because Government has a duty to protect its citizens." *Id.* (sic in original). The court found that religious arguments were improper but held that the prosecutor's comments did not deny the defendant due process because there was strong evidence of the defendant's guilt and eligibility for the death penalty. *See id.* In that case the defendant's guilt

trial lasted one day and defense counsel put on no evidence. *See id.* at 1341. After the penalty phase, the jury took less than an hour to return a death sentence. *See id.* Sandoval's trial was considerably longer and more complex, with the jury deliberating for over three days before reaching a verdict.

In *Coe v. Bell,* the Sixth Circuit held that argument that the Bible condones capital punishment was inappropriate, but that it did not in and of itself constitute reversible error. 161 F.3d at 351. The court did not explain why, but we observe that the prosecutor in that case did not argue that the Bible commanded capital punishment for the defendant. *See id.*

The First Circuit in *United States v. Giry,* held that the prosecutor's comparison of the defendant's testimony to "Peter who for the third time denied Christ" was improper, but that its prejudicial impact was significantly reduced by the trial judge's instructions and the strength of the evidence against the defendant. 818 F.2d at 132-34. *Giry* was not a capital case and defense counsel did not contemporaneously object to the prosecutor's statements. *Id.* at 122-23, 133.

The prosecutor in this case, although reminding the jury on various occasions that its duty was to determine whether the evidence in aggravation substantially outweighed the mitigating evidence and to follow the trial court's instructions, clearly intended to appeal to religious authority and did so repeatedly. The prosecutor meant this argument to have an effect on the jury. We think it did. At a minimum, we have grave doubts about the harmlessness of the error and therefore grant relief. *See Jeffries v. Wood,* 114 F.3d 1484, 1489 (9th Cir.1997) (en banc) ("Where the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error, the error is not harmless and relief should be granted.").

DENIAL OF LEAVE TO AMEND

[23] We also have considered Sandoval's claim that the district court erred in denying his motion to vacate its order striking previously unexhausted claims from his habeas petition, or alternatively for an order granting leave to amend his petition to re-raise newly-exhausted claims.

After filing a petition containing both exhausted and unexhausted claims, Sandoval chose to strike the unexhausted claims and proceed with his federal petition. In *Rose v. Lundy,* 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), the Supreme Court cautioned that a prisoner who chooses this course of action runs the risk of forfeiting his or her unexhausted claims under abuse- of-the-writ principles. *See id.* at 521, 102 S.Ct. 1198. Sandoval's effort to circumvent an abuse-of-the-writ challenge by re-introducing previously unexhausted claims into his amended habeas petition would, if successful, violate the total exhaustion rule of *Rose. See id.* at 510, 102 S.Ct. 1198. The district court did not abuse its discretion in rejecting Sandoval's attempts to do so.

CONCLUSION

We hold that the district court erred in concluding that Sandoval was prejudiced by the trial court's failure to sever the trial on the Marlene Wells murder count from the other counts in the indictment. Severance was not required. We also reject Sandoval's claim that his *Faretta* right to self- representation was improperly denied.

Because the prosecutor's religion-based closing argument denied Sandoval a fair penalty phase trial, we remand the case to the district court with instructions to grant the petition for a writ of habeas corpus as to Sandoval's death sentence unless the ***1155** State grants Sandoval a new penalty phase trial on the

Marlene Wells count within 120 days of the district court's order. In light of our disposition of this issue, we need not address Sandoval's claim that the trial judge should have declared a mistrial after the jury deadlocked, or his claim that he was denied the effective assistance of counsel by his attorneys' failure to discover and present psychological evidence in mitigation at the penalty trial.

The judgment of the district court granting the writ as to Sandoval's conviction for Marlene Wells's murder is REVERSED. The district court's grant of the writ as to Sandoval's death sentence is AFFIRMED on the grounds of improper prosecutorial argument. The district court's judgment denying relief from Sandoval's other convictions and sentences is AFFIRMED. The case is REMANDED to the district court for entry of an appropriate order for a penalty phase retrial on the Marlene Wells count, if the State elects to seek such a retrial.

FISHER, Circuit Judge, dissenting in part:

I agree with all of the majority opinion, except its resolution of Sandoval's self-representation claim. I, too, believe that, by necessity, the Sixth Amendment right to self-representation is looked upon as the weaker corollary of the Sixth Amendment right to counsel. In this case, however, we are not called upon to determine whether this somewhat disfavored right was asserted in the first instance (thereby foregoing the all-important right to counsel); rather, we must decide whether Sandoval *waived* his constitutionally protected right of self-representation once it was asserted.

Even if waiver under such circumstances is accomplished more easily than is waiver of the otherwise self-executing right to counsel, a finding of waiver calls for a *fact-specific* inquiry. The cases relied upon by the majority teach us this lesson. For

example, in *Brown v. Wainwright,* 665 F.2d 607 (Former 5th Cir.1982) (en banc), the defendant's Sixth Amendment claim was denied *after an evidentiary hearing* had been held and all of the facts had been considered by the district court. *See id.* at 616 (Garwood, J., concurring) ("I wish ... to emphasize that following an evidentiary hearing the federal district court has found on the basis of adequate evidence that Petitioner, after the requests and motion to represent himself were made and before any ruling thereon by the state trial judge, resolved his differences with his appointed counsel...."). Likewise, the Supreme Court, in *McKaskle v. Wiggins,* 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), denied the petitioner's Sixth Amendment claim only after conducting an exhaustive review of the trial transcripts, *see id.* at 180-87, 104 S.Ct. 944, and finding, on a factual basis, that "[t]he record ... reveal[ed] that [the petitioner's] pro se efforts were undermined primarily by his own, frequent changes of mind regarding counsel's role," *id.* at 182, 104 S.Ct. 944.

The problem in this case is that the facts are not as clear or developed as they were in the cases relied upon by the majority. The judge who denied Sandoval's motion was not the judge who first considered the motion and lectured Sandoval regarding the dangers of the route he was choosing. It appears from the record that the new judge was unaware of the motion and, of greater concern, the fact that Sandoval distrusted his counsel, *cf. Brown,* 665 F.2d at 612 ("In the present case, since there was no allegation by defendant that he did not trust his counsel or that counsel was incompetent, the judge had no reason to conclude counsel was misrepresenting defendant's views."). It also appears that Sandoval was unable to hear the representations made by counsel to the new judge at sidebar, so he had no opportunity to correct those representations if they were inaccurate. In addition, Sandoval contends that he was told that his motion had been denied and that library privileges had been granted in light of that denial, *not* that counsel had

presented the judge with both options and that the judge had chosen library privileges "to prevent another pro per," which is what really occurred. If all ***1156** of these facts were to prove true, one can hardly fault Sandoval for failing to reassert his right to self-representation or to challenge the trial court's denial of his original motion.

I understand the majority's concern that we must avoid encouraging a defendant to waive his or her right to counsel. That being said, however, I see no reason to caution *against* direct discussion between a court and a defendant upon withdrawal of a *Faretta* motion. I suggest that the facts of this case (particularly the judge's unfamiliarity with the motion and Sandoval's expressed distrust of his counsel) warranted such a discussion to ensure that Sandoval had in fact waived his Sixth Amendment right to act as his own counsel. All of the uncertainty surrounding Sandoval's waiver could have been clarified by the trial court without much additional time or effort, simply by addressing Sandoval directly.

Nor, as the majority seems to suggest, is a direct colloquy the only way to ensure that a defendant's Sixth Amendment right of self-representation is accorded due respect under these circumstances. I would not be writing this dissent if, for example, counsel had stated in open court that Sandoval would be satisfied with library privileges and Sandoval failed to object to the accuracy of that statement when made. Under those circumstances, it would have been unnecessary for the trial court to address the defendant directly. In fact, even if the trial court simply had denied Sandoval's motion in open court following the discussion at sidebar, Sandoval would have been put on notice *on the record* of the basis for that denial and we would be able to infer from his silence that counsel had accurately relayed his position. [FN1] Unfortunately, neither of these approaches was taken at Sandoval's hearing.

FN1. I do not suggest the record indicates that Sandoval's counsel intended to mislead the trial court. It may be the case that counsel misunderstood Sandoval. Or perhaps Sandoval *was* satisfied with library privileges and the appeal of this issue amounts to much ado about nothing. This is the information I would expect an evidentiary hearing to develop.

We must also remember the posture of this issue on appeal. The district court denied Sandoval's Sixth Amendment claim by granting *judgment on the pleadings.* Because this is a pre-AEDPA case, we review de novo and Sandoval is entitled to relief if the trial court committed an error that had a substantial influence on the outcome of his trial. *See Lopez v. Thompson,* 202 F.3d 1110, 1116 (9th Cir.2000) (en banc). Under this standard, I believe the circumstances of Sandoval's waiver merited an evidentiary hearing. *Cf. Schell v. Witek,* 218 F.3d 1017, 1027 (9th Cir.2000) (en banc) ("Evidentiary hearings are particularly appropriate when claims raise facts that occurred ... off the record.").

For these reasons, I would remand for an evidentiary hearing. I therefore dissent from the majority's determination of Sandoval's self-representation claim.

APPENDIX L

United States Court of Appeals,
Ninth Circuit.

Alfred Arthur SANDOVAL, Petitioner-Appellee,
v.
Arthur CALDERON, Warden of the California State Prison at San Quentin,
Respondent-Appellant.
Alfred Arthur Sandoval, Petitioner-Appellant,
v.
Arthur Calderon, Warden of the California State Prison at San Quentin,
Respondent-Appellee.

Nos. 99-99010, 99-99013.

Argued and Submitted June 13, 2000
Filed Nov. 6, 2000
Amended Feb. 21, 2001

After his convictions for murder and attempted murder and his death sentence were affirmed on direct appeal, 4 Cal.4th 155, 14 Cal.Rptr.2d 342, 841 P.2d 862, petitioner sought federal habeas corpus relief. The United States District Court for the Central District of California, Manuel L. Real, J., granted relief. State and petitioner appealed. On denial of rehearing, the Court of Appeals, Schroeder, Circuit Judge, held that: (1) petitioner was not entitled to severance of charges against him; (2) trial court was not required to question petitioner personally before accepting defense counsel's representation that petitioner would accept library privileges in lieu of self- representation; but (3) prosecution's invocation of religious authority during penalty phase of trial violated petitioner's constitutional rights; (4) improper argument warranted federal habeas relief; and (5)

petitioner was not entitled to reintroduce previously unexhausted claims into amended petition.

Affirmed in part, reversed in part, and remanded.

Fisher, Circuit Judge, dissented in part and filed opinion.

Opinion, 231 F.3d 1140, amended and superseded on denial of rehearing.

West Headnotes

[1] Habeas Corpus k205
197k205

Provisions of Antiterrorism and Effective Death Penalty Act (AEDPA) governing federal habeas review of state prisoner petitions do not apply to cases that were pending prior to AEDPA effective date. 28 U.S.C.A. § 2254.

[2] Habeas Corpus k205
197k205

Filing of motion for appointment of counsel and stay of execution to permit preparation of federal habeas petition, which preceded effective date of Antiterrorism and Effective Death Penalty Act (AEDPA), created "pending" case for AEDPA purposes, and therefore review of petition was governed by pre-AEDPA law. 28 U.S.C.A. § 2254.

[3] Habeas Corpus k478
197k478

Petitioner was not prejudiced by joinder of two sets of murder and attempted murder charges against him, as required to obtain federal habeas relief based on trial court's refusal to sever

counts; evidence from each set of offenses would have been admissible in trial for other offenses in light of evidence linking all offenses, and state's case against petitioner on both sets of crimes was strong. West's Ann.Cal.Evid.Code § 1101(b); West's Ann.Cal.Penal Code § 190.2(a)(3); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[4] Habeas Corpus k478
197k478

On review of petitioner's challenge to state trial court's failure to sever trial of some counts in an indictment, federal habeas court may only grant the writ if the joinder resulted in an unfair trial; there is no prejudicial constitutional violation unless simultaneous trial of more than one offense actually rendered petitioner's state trial fundamentally unfair and thus violative of due process. U.S.C.A. Const.Amend. 14.

[5] Habeas Corpus k478
197k478

Prejudice required for grant of federal habeas relief based on state trial court's failure to sever trial of some counts in indictment is shown if the impermissible joinder had a substantial and injurious effect or influence in determining the jury's verdict.

[6] Criminal Law k620(5)
110k620(5)

Risk of undue prejudice is particularly great whenever joinder of counts allows evidence of other crimes to be introduced in a trial in which the evidence would otherwise be inadmissible.

[7] Criminal Law k620(5)
110k620(5)

Undue prejudice may arise from the joinder of a strong evidentiary case with a weaker one.

[8] Criminal Law k620(5)
110k620(5)

Joinder is improper when state joins strong evidentiary case with much weaker case in hope that cumulation of evidence will lead to convictions in both cases.

[9] Criminal Law k620(1)
110k620(1)

Defendant could be tried jointly for apparent gang-related killings, killing of suspected informant, and killing of informant's wife, notwithstanding contention that wife was more innocent victim, given that evidence established links between offenses, that wife was killed at same time, in same place, and with same weapon as husband, and that trial court had no way of knowing, when pretrial severance motion was made, that evidence would show that wife was more innocent than other victims.

[10] Criminal Law k641.10(2)
110k641.10(2)

Trial court was not required to question personally defendant who had previously expressed desire to represent himself before accepting defense counsel's representation that defendant would accept library privileges in lieu of self-representation. U.S.C.A. Const.Amend. 6.

[11] Criminal Law k641.4(1)
110k641.4(1)

Defendant has a right to self-representation at trial, provided

that defendant is fully informed about the consequences of such action and then knowingly waives the benefits of legal counsel. U.S.C.A. Const.Amend. 6.

[12] Criminal Law k641.4(2)
110k641.4(2)

While the right to counsel attaches unless affirmatively waived, the right to self-representation does not attach until asserted. U.S.C.A. Const.Amend. 6.

[13] Criminal Law k641.8
110k641.8

Defendant may not invoke right to self-representation if demand is untimely, equivocal, made for the purpose of delay, or is not knowingly and intelligently made. U.S.C.A. Const.Amend. 6.

[14] Criminal Law k641.10(2)
110k641.10(2)

In light of the disfavored status which the right to self-representation enjoys vis-a-vis the right to counsel, there is no rule that a defendant who has once expressed a desire for self-representation must be cautioned or addressed personally before receiving the assistance of counsel; it is the defendant who wishes to waive counsel who must be addressed personally before being permitted to represent him or herself. U.S.C.A. Const.Amend. 6.

[15] Criminal Law k641.10(2)
110k641.10(2)

While advisable in some cases, a personal dialogue between trial court and defendant is not required when circumstances indicate that defendant has changed his or her mind about

self-representation to ensure that defendant has accepted counsel's representation. U.S.C.A. Const.Amend. 6.

[16] Sentencing and Punishment k1780(2)
350Hk1780(2)

[16] Sentencing and Punishment k1789(9)
350Hk1789(9)

Prosecution's closing argument in penalty phase of capital trial, which invoked religious authority to justify imposition of death sentence, was both improper and highly prejudicial, in violation of defendant's constitutional rights; argument frustrated purpose of closing argument of explaining to jury what it had to decide and what evidence was relevant to its decision, violated Eighth Amendment principle that death penalty be imposed based on jury's weighing only of applicable factors, and undercut jury's sense of responsibility for imposing death penalty. U.S.C.A. Const.Amend. 8.

[17] Criminal Law k857(1)
110k857(1)

Jury's decision is to be based upon the evidence presented at trial and the legal instructions given by the court.

[18] Criminal Law k718
110k718

Argument urging the jury to decide the matter based upon factors other than those it is instructed to consider is improper.

[19] Criminal Law k723(1)
110k723(1)

Any suggestion in closing argument that the jury may base its

decision on a "higher law" than that of the court in which it sits is forbidden.

[20] Sentencing and Punishment k1780(2)
350Hk1780(2)

In a capital case, the prosecution's invocation of higher law or extra-judicial authority violates the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict. U.S.C.A. Const.Amend. 8.

[21] Sentencing and Punishment k1780(2)
350Hk1780(2)

Prosecution's invocation of religious authority to support imposition of death sentence during closing arguments in penalty phase of capital trial was not fair response to comments in defense counsel's closing argument, in which counsel used phrase "playing God" and referred to "an eye for an eye" in the context of secular argument against vengeance.

[22] Habeas Corpus k497
197k497

To warrant federal habeas relief, petitioner must show that prosecutor's improper argument had substantial and injurious effect or influence in determining the jury's verdict.

[23] Habeas Corpus k497
197k497

Prosecution's improper invocation of religious authority during closing arguments in penalty phase of capital trial warranted federal habeas relief; in light of force of argument, which

indicated that death penalty was in accord with God's will, fact that jury was deadlocked after three days of deliberations and considerable mitigating evidence which countered that in aggravation raised grave doubts about harmlessness of error.

[24] Habeas Corpus k672
197k672

Federal habeas petitioner who elected to strike unexhausted claims and proceed with federal habeas petition was not entitled, following exhaustion, to reintroduce previously unexhausted claims into amended habeas petition.
***768** Jeffrey B. Kahan, Deputy Attorney General, Los Angeles, California, for the respondent-appellant/appellee.

Manuel U. Araujo, Beverly Hills, California and Michael S. Magnuson, Whittier, California, for the petitioner-appellee/appellant.

C. Renee Manes, Assistant Federal Public Defender, Los Angeles, California; John T. Philipsborn, San Francisco, California; and Joseph Schlesinger, Assistant Federal Public Defender, Sacramento, California, for the amici.

Appeals from the United States District Court for the Central District of California; Manuel L. Real, District Judge, Presiding. D.C. No. CV-94-08206- R.

Before: SCHROEDER, HAWKINS and FISHER, Circuit Judges.

Opinion by Judge SCHROEDER; Dissent by Judge FISHER

ORDER

The Brief of Amici Curiae is ordered filed.

The majority opinion filed November 11, 2000, is amended as follows:

At 231 F.3d 1140, 1145, delete the last paragraph under "APPLICABILITY OF AEDPA" and insert the following paragraph: "We also reject the State's argument that *Ortiz v. Stewart,* 149 F.3d 923 (9th Cir.1998), *cert. denied,* 526 U.S. 1123, 119 S.Ct. 1777, 143 L.Ed.2d 806 (1999), requires us to apply the substantive changes wrought by AEDPA to Sandoval's habeas petition. Because Sandoval filed his section 2254 petition in the district court prior to the enactment of AEDPA, pre-AEDPA law governs his right to relief in the trial court. *See Slack v. McDaniel,* 529 U.S. 473, 486-87, 120 S.Ct. 1595, 1605, 146 L.Ed.2d 542 (2000)."

At 231 F.3d 1140, 1154 delete the second paragraph under the heading "DENIAL OF LEAVE TO AMEND", and add the following sentence to the end of the first paragraph under that same heading:

"We have reviewed the record and find no abuse of discretion by the district court. *See Bonin v. Calderon,* 59 F.3d 815, 845-46 (9th Cir.1995)."

At 231 F.3d 1140, 1151, delete the second full paragraph beginning with "The Establishment Clause...."

With these amendments, the panel majority has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Fisher would grant rehearing on the *Faretta* issue.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

OPINION

SCHROEDER, Circuit Judge:

California state prisoner Alfred Arthur Sandoval was convicted of four murders and one attempted murder. He was sentenced to death for one of the murders and to life imprisonment without possibility of parole on the other murder charges. The California Supreme Court affirmed the convictions and, over the dissent of Justice Mosk, the sentences. *See People v. Sandoval*, 4 Cal.4th 155, 14 Cal.Rptr.2d 342, 841 P.2d 862 (Cal.1992). Justice Mosk would have vacated the death sentence and held that the prosecutor's penalty phase summation by its heavy reliance on religious authority in arguing to the jury that the death penalty was sanctioned by God, was not harmless beyond a reasonable doubt. *See id.* at 205, 14 Cal.Rptr.2d 342, 841 P.2d 862 (Mosk, J., concurring and dissenting).

After the California Supreme Court denied Sandoval's petitions for collateral review, the district court granted habeas relief ***769** on the ground that the trial for the single murder count on which the death penalty was imposed should have been severed from the trial on the other crimes. The court reasoned that the victim in the former was more innocent than the other victims. The district court otherwise denied relief, and both Sandoval and the State appeal.

We find no constitutional infirmity in Sandoval's convictions. The trial court was not required to sever any counts in this case. The district court therefore erred in granting the writ on severance grounds. We also reject Sandoval's claim that he was denied his right to represent himself under *Faretta v.*

California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The trial court did not err in accepting defense counsel's representation that Sandoval would accept library privileges in lieu of representing himself at trial.

Although we find Sandoval's challenges to his convictions to be without merit, we do hold that Sandoval is entitled to habeas relief from his death sentence. Sandoval was denied a fair penalty phase trial by the prosecutor's closing argument that invoked divine authority and paraphrased a well known Biblical passage as support for imposition of the death penalty.

BACKGROUND

Sandoval was convicted of two sets of crimes. The first set occurred in Belvedere Park in Los Angeles during a gang-related fight in the early morning hours of October 14, 1984. At the guilt phase of the trial, three witnesses testified that Sandoval, a member of the Arizona Marivilla gang, shot Gilbert Martinez and Anthony Aceves in the head at close range. He also shot Manuel Torres in the neck, but Torres did not die from the wound. The victims were all members of the Mariana Marivilla gang.

About two weeks later, on October 31, 1984, Ray and Marlene Wells were shot to death in their home. Forensic evidence showed that Ray, like Martinez and Aceves, was shot "execution style" in the head at close range. Marlene was shot from a greater distance. At trial, the Wellses' neighbor testified that he heard shots the night of the murders and saw the silhouette of a medium- sized person with slicked-back hair, leave the house. He also noticed a dark Chevrolet parked near the Wellses' home. He initially thought the car was an Impala, but after consulting one of his car books, determined that the car was a 1968 Caprice.

Benjamin Verduzco, a long-time friend of Sandoval's, testified that Sandoval hid the car he drove the night of the Belvedere Park murders in Verduzco's garage. One morning while Sandoval was at Verduzco's house, Ray and Marlene Wells visited the house. Later the same day, the police impounded the car Sandoval had hidden at Verduzco's house. The Wellses were killed a few days later.

The night of the Wells murders, Verduzco received a call from Sandoval during which Sandoval told him that he "just did the big mouth in." When Verduzco questioned who the "big mouth" was, Sandoval asked him if he remembered "the one who was there in the morning with the car" and used the name "R." Sandoval also told him that he "had to do her, too" because she saw him kill "R."

The State also put on evidence that connected Sandoval to the car observed at the Wells murder site. On October 7, 1984, a black 1968 Caprice in good condition matching the description of the car at the murder scene was stolen from the Los Angeles zoo parking lot. Sandoval bought a run-down 1968 Chevy Caprice sometime in October 1984. Police later found the stolen car at the Mexican border at Tecate with a license plate and vehicle identification number with a "pink slip" in the name of the previous owner of the Caprice sold to Sandoval. The driver of the stolen car was a member of the Arizona Marivilla gang.

***770** The jury found Sandoval guilty of four counts of first degree murder and one count of attempted murder. It also found true the special circumstances of multiple murder within the meaning of California Penal Code Section 190.2(a)(3), making Sandoval eligible for the death penalty.

During the penalty phase of the trial, the State presented aggravating evidence about Sandoval's behavior, including

witness testimony about specific events demonstrating Sandoval's history of violence. In mitigation, Sandoval presented testimony from friends and family members who described his abused childhood and his commitment to his family, his positive contributions to his community, and his service as a prisoner trustee.

During the prosecutor's summation to the jury, he argued that Sandoval should be put to death for the murders. In urging the jury to return death verdicts, the prosecutor relied heavily on religious authority as commanding capital punishment for Sandoval's crimes.

The jury deliberated for three and a half days before notifying the trial judge that it was irretrievably deadlocked. After the judge returned the jury to its deliberations, it reached a verdict after one hour and forty minutes. It concluded that Sandoval should be sentenced to death for the murder of Marlene Wells and to life without possibility of parole for the other murders. The convictions were affirmed on appeal. *See People v. Sandoval,* 4 Cal.4th 155, 14 Cal.Rptr.2d 342, 841 P.2d 862 (Cal.1992). The Supreme Court granted certiorari to consider whether California's "reasonable doubt" jury instruction violated due process. The Court upheld the instruction. *See Victor v. Nebraska,* 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).

Sandoval filed a petition for a writ of habeas corpus with the California Supreme Court raising several challenges to his convictions and sentences. The court denied the petition on the merits in an unpublished order. Sandoval then, on July 1, 1996, filed a federal habeas petition which he amended on July 29, 1996. In an effort to exhaust some of the claims in his federal petition, Sandoval also filed a second habeas petition in the California courts.

The district court originally stayed the federal petition pending exhaustion of state remedies. It declined to extend the stay, however, and granted the State's motion to strike Sandoval's unexhausted claims. Meanwhile, the Supreme Court of California denied some of the claims in Sandoval's second petition on the merits and found the rest of the claims procedurally barred.

With respect to the exhausted claims, the district court dismissed several of Sandoval's claims on the pleadings, including his claim that he was erroneously denied the right to represent himself, that a mistrial should have been declared after the penalty phase trial on account of jury deadlock, and that improper prosecutorial argument denied him a fair penalty phase trial. The court granted summary judgment to the State on each of Sandoval's remaining claims, except his claim that the trial court should have severed the Belvedere Park counts from the Wells counts at trial. The district court found that the conviction and sentence for the murder of Marlene Wells was constitutionally infirm because the trial court should have severed her count from the other counts on the ground that she was not tied to any gang or other illegal activity and hence was an innocent victim. The court did not dispute the State's contention, however, that all of the shootings would be admissible in a separate trial for the murder of Marlene Wells. Finding that Sandoval was prejudiced by the joinder only on the Marlene Wells count, the court denied the writ as to the remaining convictions and sentences.

APPLICABILITY OF AEDPA

[1][2] Before turning to the merits of these appeals, we must first determine ***771** whether the provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), apply to this case. AEDPA's provisions for federal

review of state prisoner petitions do not apply to cases that were pending prior to its effective date, April 24, 1996. *See Lindh v. Murphy,* 521 U.S. 320, 327, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). On December 7, 1994, Sandoval had filed a motion with the district court for appointment of counsel and for a stay of execution in order to prepare a habeas petition. We have held that such a filing is sufficient to create a "pending" case for AEDPA purposes. *See Calderon v. United States District Court (Kelly),* 163 F.3d 530, 540 (9th Cir.1998) (en banc), *cert. denied,* 526 U.S. 1060, 119 S.Ct. 1377, 143 L.Ed.2d 535 (1999). Therefore, pre-AEDPA law governs our review.

The State nevertheless contends that the expedited procedures of AEDPA's Chapter 154, 28 U.S.C. §§ 2261-66 (West Supp.2000) apply in this case. In contrast to § 2254, Chapter 154 applies to cases that were pending at the time AEDPA was signed into law. Chapter 154 creates a quid pro quo arrangement whereby states that meet certain statutory requirements for unitary review and appointment of counsel are entitled to limit federal habeas litigation to petitions filed within 180 days after state court proceedings are completed. *See* 28 U.S.C. § 2263(a).

The State argues that California's unitary review system qualifies for Chapter 154's expedited review procedures. We have already rejected this claim. *See Ashmus v. Woodford,* 202 F.3d 1160, 1165 (amended opinion) (holding that, at least until January 1, 1998, California's unitary review scheme did not comply with the eligibility requirements of Chapter 154 and that the state therefore could not avail itself of the procedural advantages of that Chapter), *cert. denied,* --- U.S. ----, 121 S.Ct. 274, 148 L.Ed.2d 199 (2000) (No. 99-1720).

We also reject the State's argument that *Ortiz v. Stewart,* 149 F.3d 923 (9th Cir.1998), *cert. denied,* 526 U.S. 1123, 119 S.Ct. 1777, 143 L.Ed.2d 806 (1999), requires us to apply the

substantive changes wrought by AEDPA to Sandoval's habeas petition. Because Sandoval filed his section 2254 petition in the district court prior to the enactment of AEDPA, pre-AEDPA law governs his right to relief in the trial court. *See Slack v. McDaniel,* 529 U.S. 473, 486-87, 120 S.Ct. 1595, 1605, 146 L.Ed.2d 542 (2000).

SEVERANCE

The parties spend a great deal of time debating whether any claim that the Marlene Wells murder count should have been severed from the remaining charges was properly before the district court when it ruled such severance was required. The State takes the position that it was not, because Sandoval moved to sever both of the Wells murder counts from the Belvedere Park counts. We need not parse the petitioner's contentions so finely because we conclude that due process did not require a separate trial on any of the counts.

Before trial, Sandoval twice moved to sever the Belvedere Park charges from the Wells murder charges. His principal argument was that evidence for each of the two sets of crimes lacked cross-admissibility. The trial court denied both motions. It noted that the prosecution's theory of the case was that the Wells killings occurred because of the Belvedere Park killings. It found that if the prosecutor came forward with evidence linking the two crimes, the evidence would be cross-admissible. Based upon the prosecutor's assurances that Benjamin Verduzco's testimony would provide that evidentiary link, the court denied the severance motions. The testimony did provide that link.

[3][4][5] On habeas review of a prisoner's challenge to a trial court's failure to sever trial of some counts in an indictment, we may only grant the writ if the joinder ***772** resulted in an unfair trial. There is no prejudicial constitutional violation unless

"simultaneous trial of more than one offense ... actually render[ed] petitioner's state trial fundamentally unfair and hence, violative of due process." *Featherstone v. Estelle,* 948 F.2d 1497, 1503 (9th Cir.1991). This prejudice is shown if the impermissible joinder had a substantial and injurious effect or influence in determining the jury's verdict. *See Bean v. Calderon,* 163 F.3d 1073, 1086 (9th Cir.1998), *cert. denied* 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999).

[6][7] We have recognized that the risk of undue prejudice is particularly great whenever joinder of counts allows evidence of other crimes to be introduced in a trial where the evidence would otherwise be inadmissible. *See United States v. Lewis,* 787 F.2d 1318, 1322 (9th Cir.1986). Undue prejudice may also arise from the joinder of a strong evidentiary case with a weaker one. *See id.; Bean,* 163 F.3d at 1085. The reason there is danger in both situations is that it is difficult for a jury to compartmentalize the damaging information. *See Bean,* 163 F.3d at 1084.

Our review of the record in this case leads us to conclude that Sandoval was not actually prejudiced by the joinder of the Wells counts with the Belvedere Park counts. The Belvedere Park crimes would have been admissible in a separate Wells crimes trial and the evidence of Sandoval's guilt for the Wells crimes was not significantly weaker than the evidence for the Belvedere Park crimes.

The State alleged that Sandoval murdered the Wellses because he believed Ray Wells told the police that the car Sandoval used in the Belvedere Park murders was hidden in Verduzco's garage. Thus, evidence of the Belvedere Park murders would have been admissible in a separate trial on the Wells murders to prove motive and identity. *See* Cal. Evid.Code § 1101(b) (West 2000) ("Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other

act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."); *see also* Fed.R.Evid. 404(b). Similarly, evidence about the Wells crimes would have been admissible in a Belvedere Park crimes trial. The crimes are linked by Sandoval's car and Verduzco's testimony and because they had a similar modus operandi. Evidence of the separate killings would also have been admissible in both trials to establish the State's allegations of multiple murder special circumstance. *See* Cal.Penal Code § 190.2(a)(3). This cross-admissibility dispels the prejudicial impact of joining all counts in the same trial. *See United States v. Johnson,* 820 F.2d 1065, 1070-71 (9th Cir.1987); *People v. Mason,* 52 Cal.3d 909, 934, 277 Cal.Rptr. 166, 802 P.2d 950 (Cal.1991). The jury would have heard the evidence in any event.

[8] Nor is this a case where the State joined a strong evidentiary case with a much weaker case in the hope that the cumulation of the evidence would lead to convictions in both cases. Such joinder is improper. *See Bean,* 163 F.3d at 1085. The State's case against Sandoval for the Belvedere Park crimes was strong. Three eyewitnesses testified that they saw Sandoval shoot the victims. One of the defense's own witnesses admitted during a heated cross- examination that he saw Sandoval at the park that night around the time of the shootings. Defense counsel admitted during closing argument that Sandoval hid his car in Verduzco's garage and fled.

The State's case against Sandoval for the Wells murders was also strong. Prosecution witnesses linked the car at the murder scene to Sandoval and Verduzco's ***773** testimony incriminated Sandoval directly. Sandoval points out that the defense

impeached Verduzco by establishing that his testimony had been inconsistent at times, that he had several prior convictions, and that he was testifying in exchange for $600 a month, a new identity, and early release from prison. The issue of credibility was, however, for the jury and it ultimately credited Verduzco's testimony.

Given the strength of the State's case against Sandoval on both sets of crimes, and the cross-admissibility of the evidence on each set, we conclude that Sandoval's trial was not actually prejudiced by the joinder. In so holding, we reject Sandoval's argument that we must reach the same result as reached in *Bean*. *Bean* involved the joinder of a strong evidentiary case with a relatively weak one and the use of evidence that was not cross- admissible for both sets of crimes. 163 F.3d at 1084-85.

[9] We also reject the district court's finding that Sandoval was prejudiced by the trial court's failure to sever the Marlene Wells count from the remaining counts. The district court held that severance was required because Marlene Wells was an innocent victim and the other victims were all of questionable character. Yet, Marlene Wells was killed at the same time, in the same place, and with the same weapon as her husband, Ray. Moreover, the trial judge had no way of knowing at the time of the pre-trial severance motion that the evidence would eventually show that Marlene Wells was more innocent than the other victims. There was no error, let alone prejudicial error rising to the level of a constitutional violation, in trying the Wells murder counts jointly.

SELF-REPRESENTATION

Sandoval also contends that he is entitled to a new trial because he was denied his right to represent himself under *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). *Faretta* established a defendant's right to

self-representation, provided that the defendant knows of its disadvantages and voluntarily waives counsel.

Sandoval's pretrial motion to represent himself was calendared for hearing before the original trial judge assigned to his case. At the hearing, that judge lectured Sandoval on why self-representation was a bad idea, and counseled Sandoval to accept the help of his lawyers. Sandoval stated that he had already given the idea considerable thought, but the judge delayed ruling on the motion to give Sandoval a week to consider his advice. Sandoval's case was then transferred to another judge.

At a pretrial meeting with the new judge, counsel had a conference at the sidebar to discuss certain matters. The sidebar proceedings were not audible to Sandoval. At this conference, according to Sandoval's verified habeas petition, defense counsel advised the judge that there was a pending *Faretta* motion, but that Sandoval would be satisfied with library privileges instead of self-representation. These were granted. Sandoval alleges that his lawyer's statement to the judge that he was really after library privileges was not accurate. He claims that if he had known that counsel bargained his *Faretta* rights for library privileges he would have protested.

[10] The issue for our decision is whether the trial court erred in accepting counsel's representation that Sandoval would be satisfied with library privileges in lieu of self-representation and was instead constitutionally required to question the defendant personally as to whether he was willing to accept counsel's continued assistance at trial. If a personal colloquy was required, we must remand for an evidentiary hearing. We hold, however, that it was not.

[11][12] A criminal defendant has a right to self-representation at trial, provided that the defendant is fully informed about the

consequences of such action and ***774** then knowingly waives the benefits of legal counsel. *See id.* at 835, 95 S.Ct. 2525. This right, however, occupies no hallowed status similar to the right to counsel enshrined in the Sixth Amendment. While the right to counsel attaches unless affirmatively waived, the right to self- representation does not attach until asserted. *See Adams v. Carroll,* 875 F.2d 1441, 1444 (9th Cir.1989) ("The right to the assistance of counsel is automatic; ... [t]o exercise the right to self-representation, on the other hand, a criminal defendant must negotiate a number of procedural obstacles."); *Brown v. Wainwright,* 665 F.2d 607, 610 (5th Cir.1980) ("In the absence of a clear and knowing election, a court should not quickly infer that a defendant unskilled in the law has waived counsel and has opted to conduct his own defense."); *see also United States v. Teague,* 953 F.2d 1525, 1538 & n. 4 (11th Cir.1992) (en banc) (Birch, J., concurring in the result) (discussing the preeminence of the right to counsel); *Tuitt v. Fair,* 822 F.2d 166, 174 (1st Cir.1987) ("Where the two rights are in collision, the nature of the two rights makes it reasonable to favor the right to counsel which, if denied, leaves the average defendant helpless."); *United States v. Weisz,* 718 F.2d 413, 425-26 (D.C.Cir.1984) (citing *Brown*).

[13] Because invocation of the right to self-representation entails a concomitant forfeiture of the important benefits offered by the right to counsel, our cases have come to recognize certain limitations on a defendant's right to self-representation. A defendant may not invoke the *Faretta* right if the *Faretta* demand is untimely, equivocal, made for the purpose of delay, or is not knowingly and intelligently made. *See United States v. Schaff,* 948 F.2d 501, 503 (9th Cir.1991). Moreover, the Supreme Court has limited *Faretta* in material respects in the years since it was decided. Last Term, the Court held that *Faretta* does not extend to a criminal defendant on direct appeal from a criminal conviction. *See Martinez v. Court of Appeal of California,* 528 U.S. 152, 120 S.Ct. 684, 687, 145 L.Ed.2d 597

(2000). In the trial context, the Court has held that there is no absolute bar to standby counsel's unsolicited participation in a trial of a self-representing defendant. *See McKaskle v. Wiggins,* 465 U.S. 168, 176-77, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). In *McKaskle,* the petitioner claimed "that the *Faretta* right will be eviscerated if [court-appointed standby] counsel is allowed to argue with the defendant, make motions to the court contrary to the defendant's wishes, and take other steps not specifically approved by the defendant." *Id.* at 177, 104 S.Ct. 944. He urged the Court to adopt the Fifth Circuit's rule "that court-appointed standby counsel is to be seen, but not heard." *Id.* at 173, 104 S.Ct. 944 (internal quotation marks omitted). The Court rejected those arguments.

[14] Thus, in light of the disfavored status the right to self-representation enjoys vis-a-vis the right to counsel, there is no rule that a defendant who has once expressed a desire for self-representation must be cautioned or addressed personally before receiving the assistance of counsel. The law is to the contrary. It is the defendant who wishes to waive counsel who must be addressed personally before being permitted to represent him or herself. *See Faretta,* 422 U.S. at 835, 95 S.Ct. 2525; *United States v. Arlt,* 41 F.3d 516, 520 (9th Cir.1994). This colloquy enables the trial court to advise the defendant of the numerous benefits of counsel and attendant pitfalls of self-representation. *See Faretta,* 422 U.S. at 835, 95 S.Ct. 2525. After engaging in this discussion with the defendant, the trial court should not then be put in the position of suggesting even indirectly to a criminal defendant that he or she would benefit from self-representation. Yet such a suggestion would be difficult to avoid if the trial court were required to question a criminal defendant personally as to whether he or she really wanted to retain the assistance of counsel, despite counsel's statements that the defendant ***775** had withdrawn a *Faretta* request. The trial court therefore did not err in accepting, without personally addressing Sandoval, defense counsel's

representation that Sandoval would accept library privileges in lieu of self-representation.

[15] Another Circuit has already expressly recognized this principle. In *Brown v. Wainwright,* the former Fifth Circuit found that once defendants appear through their attorneys the law does not require the court to inform defendants personally of their right to represent themselves. 665 F.2d at 612. The *Brown* court specifically rejected the claim that a trial judge is constitutionally required to engage in a personal colloquy with the defendant to ensure that the defendant has knowingly and voluntarily withdrawn his or her *Faretta* demand. *Id.* We agree with that court that, while advisable in some cases, a personal dialogue between the court and the defendant is not required where circumstances indicate that the defendant has changed his or her mind about self-representation. *See id.*

PROSECUTORIAL INVOCATION OF GOD'S AUTHORITY

At the close of the penalty phase trial, the prosecutor argued to the jury that the death penalty was sanctioned by God. [FN1] His argument paraphrased Romans 13:1-5, a passage from the Bible's New Testament commonly understood as providing justification for the imposition of the death penalty. *See* Robert Parham, *Please Stop Using the Scriptures as Rationale for Capital Punishment, The Tennessean,* Apr. 13, 2000; Larry Swindell, *Capital Idea: A Persuasive Examination-and Denunciation-on the Death Penalty, Fort Worth Star-Telegram,* Nov. 23, 1997; Robert Marquand, *Death Penalty Issue Stirs Divergent Religious Views, McVeigh Case Inspires Debate on Moral Aspects of Society's Ultimate Sanction, Christian* ***776** *Science Monitor,* June 12, 1997. The prosecutor told the jurors that God sanctioned the death penalty for people like Sandoval who were evil and have defied the authority of the State. He explained that by sentencing Sandoval to death, the jury would be "doing what God says." The prosecutor added that imposing

the death penalty and destroying Sandoval's mortal body might be the only way to save Sandoval's eternal soul.

> FN1. The prosecutor argued:
> I want to respond to some of the things argued by [defense counsel]. He told you that it's absurd to talk about life and death, that the law is absurd, that you are playing God, that it's revenge.
> And that is to get you, of course, to vote for life without the possibility of parole. Well, death is a legitimate means of punishment in this state. It's available in this state. You are called upon to impose it if you think it's appropriate. You are a cross section of the community. People are judged by a jury of their peers. You make that determination whether the defendant should get the death penalty or life without the possibility of parole. The defense wants to make that burdensome for you. Each and everyone of you from here on must live with that decision. Push that button over there. You must live with that decision for the rest of your life.
> Well, if it wasn't you called upon to carry out the will of the people of the state of California, it would have been another jury, because that's our system. That's how the law is affected [sic] in this state. Don't once think that you have to feel burdened and depressed because I voted for death. You are doing what the law says if it's substantial, the aggravation substantially outweighs the mitigation. Don't listen to this lawyer talk.
> You will hear lingering doubt. You will hear other antics and whatever [defense counsel] is going to come up with [in rebuttal]. I won't be responding probably, but you can't lose focus. Don't feel guilty about what your decision is. *[Defense counsel] says don't play God. Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed*

the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an avenger who brings wrath upon one who practices evil.

You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right.

... Don't be fooled by what's to come [in defense's rebuttal]. Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority.

[16] Sandoval claims that the prosecutor's use of this argument denied him a fair penalty phase trial. We agree with Sandoval that the argument was both improper and highly prejudicial.

[17][18][19] The prosecutor's argument frustrated the purpose of closing argument, which is to explain to the jury what it has to decide and what evidence is relevant to its decision. *See United States v. Iglesias,* 915 F.2d 1524, 1529 (11th Cir.1990). The jury's decision is to be based upon the evidence presented at trial and the legal instructions given by the court. *See Chandler v. Florida,* 449 U.S. 560, 574, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981) ("Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."). Argument urging the jury to decide the matter based upon factors other than those it is instructed to consider is improper. We have therefore condemned argument that is inflammatory or appeals to bias or prejudice. *See e.g., Bains v. Cambra,* 204

F.3d 964, 974-75 (9th Cir.2000) (finding that the prosecutor's inflammatory argument invited the jurors "to give into their prejudices and to buy into the various stereotypes that the prosecutor was promoting"); *see also Cunningham v. Zant,* 928 F.2d 1006, 1020 (11th Cir.1991) (noting that the prosecutor's comparison of the defendant to Judas Iscariot and other comments improperly appealed to the jury's passions and prejudices and sought to inflame and misinform the jury); ABA Standards for Criminal Justice § 3-5.8(c)-(d) (3d ed. 1993) ("The prosecutor should not make arguments calculated to appeal to the prejudices of the jury ... [and] should refrain from argument which would divert the jury from its duty to decide the case on the evidence."). Similarly, any suggestion that the jury may base its decision on a "higher law" than that of the court in which it sits is forbidden. *See Jones v. Kemp,* 706 F.Supp. 1534, 1558-59 (N.D.Ga.1989); *Commonwealth v. Chambers,* 528 Pa. 558, 599 A.2d 630, 644 (1991). The obvious danger of such a suggestion is that the jury will give less weight to, or perhaps even disregard, the legal instructions given it by the trial judge in favor of the asserted higher law.

[20] In a capital case like this one, the prosecution's invocation of higher law or extra-judicial authority violates the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict. *See Godfrey v. Georgia,* 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (holding that capital sentencing statutes must "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death") (internal citations and quotation marks omitted). The Biblical concepts of vengeance invoked by the prosecution here do not recognize such a refined approach. *See Jones,* 706 F.Supp. at 1559-60; *cf. Tison v. Arizona,* 481 U.S. 137,

180-81, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (Brennan, J., dissenting) (noting the "crude proportionality of 'an eye for an eye' "); *Coker v. Georgia,* 433 U.S. 584, 620, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (Burger, C.J., dissenting) ("As a matter of constitutional principle, [the Eighth Amendment proportionality] test cannot have the primitive simplicity of 'life for life, eye for eye, tooth for tooth.' ").

***777** Argument involving religious authority also undercuts the jury's own sense of responsibility for imposing the death penalty. The Supreme Court has disapproved of an argument tending to transfer the jury's sense of sentencing responsibility to a higher court. *See Caldwell v. Mississippi,* 472 U.S. 320, 330-34, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (holding that a prosecutor's argument that the jury's capital sentencing decision was not final because it would be reviewed by an appellate court unconstitutionally encouraged the jury to delegate its feeling of responsibility for the defendant's sentence to the appellate court). A fortiori, delegation of the ultimate responsibility for imposing a sentence to divine authority undermines the jury's role in the sentencing process.

For these reasons, religious arguments have been condemned by virtually every federal and state court to consider their challenge. *See Coe v. Bell,* 161 F.3d 320, 351 (6th Cir.1998); *Bennett v. Angelone,* 92 F.3d 1336, 1346 (4th Cir.1996); *Cunningham,* 928 F.2d at 1019-20; *United States v. Giry,* 818 F.2d 120, 133 (1st Cir.1987); *Chambers,* 599 A.2d at 644; *People v. Eckles,* 83 Ill.App.3d 292, 38 Ill.Dec. 934, 404 N.E.2d 358, 365 (1980); *State v. Wangberg,* 272 Minn. 204, 136 N.W.2d 853, 854-55 (1965).

Our nation's courts are not alone in rejecting religious argument. The Ontario Court of Appeal has as well. The Canadian Constitution does not recognize the separation of church and state. *See e.g.* Canadian Constitution Act of 1982,

Part 1, Canadian Charter of Rights and Freedoms ("Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law...."). Yet the Canadian court found counsel's references to Biblical stories to be "inappropriate in the extreme." *R. v. Finta,* [1992] 53 O.A.C. 1, 1992 Carswell Ont. 96 at ¶ 250.

[21] We thus agree with the Supreme Court of California's own conclusion that the prosecutor's argument in this case was improper and was not merely fair response to comments in defense counsel's closing argument. Defense counsel used the phrase "playing God" and referred to "an eye for an eye" in the context of a secular argument against vengeance. [FN2] Defense counsel did not invoke religious authority to support the result he advocated.

FN2. In relevant part, defense counsel stated:

> Revenge? That's really what we're talking about. When you convicted Mr. Sandoval of these four murders and found the special circumstances to be true, you already guaranteed one thing. Fred Sandoval will die in the penitentiary is one of them in the state of California. Period. He will never come out. He will die in the penitentiary.
>
> The question is is he going to die whatever it is in three years in the gas chamber or is he going to die of old age in the pen or is he going to die because someone stabs him in the back in the penitentiary? But the reality is that he is going to die in the penitentiary. That's already been decided and you decided that.
>
> And in facing you again and thinking about that and thinking about how hard your job is, how difficult your job is, in reality you could sit, play God to an individual. I have to look you in the eye again and I want to know. I have been waiting. I respect your decision.

. . . . . .

> I have come to grasp it now. I looked at you in the eye an you can look back at me. Doesn't change anything. Nothing will bring back Anthony Aceves and Gilbert Martinez and the two Wells. Nothing. Won't change. Bottom line is revenge. Just pure and simple. Vengeance. If that's what you want, that's what you feel, push the button. An eye for an eye, a tooth for a tooth, a stripe for a stripe, a life for a life.

. . . . . .

> He has a chance for doing some good. Anything that you do. I don't think society requires revenge. I don't think that you require revenge. An eye for an eye.
> Ghandi said we do this eye for an eye thing, make society require it and do it, what happens is the whole world becomes blind. The light is shut out. That's not right. Don't shut out the light. Don't make the world blind. Don't push that button.

***778** [22][23] Our finding of constitutional error does not end the inquiry, however. To warrant habeas relief, Sandoval must show that the prosecutor's improper argument " 'had [a] substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht v. Abrahamson,* 507 U.S. 619, 638, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (quoting *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). The prosecutor's allusion to Scripture must have prejudiced Sandoval's chances of receiving life without possibility of parole instead of the death penalty.

While we agree with the California Supreme Court that the

prosecutor's argument was improper, we disagree with the majority's conclusion that the argument was harmless. We need not decide whether a prosecutor's invocation of religious authority during the penalty phase of a capital case is prejudicial per se, as at least one state court has held. *See Chambers,* 599 A.2d at 644; *see also* Brian C. Duffy, Note, *Barring Foul Blows: An Argument for a Per Se Reversible-Error Rule for Prosecutors' Use of Religious Arguments in the Sentencing Phase of Capital Cases,* 50 Vand. L.Rev. 1335 (1997) (arguing that a per se reversible error rule is required when prosecutors invoke religious authority to a jury in support of the death penalty because the traditional contextual analysis underestimates the prejudicial effect and discounts the constitutional nature of the misconduct). *But see* Elizabeth A. Brooks, Note, *Thou Shalt Not Quote the Bible: Determining the Propriety of Attorney Use of Religious Philosophy and Themes in Oral Arguments,* 33 Ga. L.Rev. 1113 (1999) (claiming that a per se prejudice rule is unworkable and undesirable). We conclude that the prosecutor's remarks actually prejudiced Sandoval.

We examine the likely effect of the statements in the context in which they were made. *See Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *Bennett,* 92 F.3d at 1346-47. The prosecutor's language in this case was eloquent, powerful, and unmistakably Biblical in style. The core of his remarks bears repeating here:

> Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same for it is a minister of God to you for good. But

> if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an avenger who brings wrath upon one who practices evil.

This was strong medicine. The lay juror would readily understand the words as referring to Scripture. The message was clear: those who have opposed the ordinance of God should fear the sword-bearing state, whose task, as an avenging minister of God, is to bring wrath upon those who, like Sandoval, practice evil.

Those learned in the New Testament would recognize the argument as closely following the thirteenth chapter of the Book of Romans. The chapter reads in relevant part:

> *Submission to the Authorities*
>
> 1 Everyone must submit himself to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God.
>
> 2 Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves.
>
> 3 For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and he will commend you.
>
> ***779** 4 For he is God's servant to do you good. But if you do wrong, be afraid, for he does not bear the sword for nothing. He is God's servant, an agent of wrath to bring punishment on the wrongdoer.
>
> 5 Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also because of conscience.

13 *Romans* 1-5 (NIV Study Bible 10th Anniversary Ed.).

Having thus cloaked the State with God's authority, the

prosecutor then referenced the words used by defense counsel and refuted them by further invocation of religious command: "You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right.... Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."

There could be no clearer an invocation of divine authority to direct a jury's verdict. Defense counsel objected to the argument, but the objection was overruled and no curative instruction given.

This is not a case where the evidence overwhelmingly supported the jury's verdict. The issue was life or death and the jury was sharply divided. After over three days of deliberations, the jury informed the trial judge that it was hopelessly deadlocked. It was divided 6-6 on two of the counts and 7-5 on the other two. In response to the judge's question whether the jury could possibly reach a result if it deliberated further or perhaps had portions of the transcript read back to it, each juror individually answered "no." Upon being returned to its deliberations, the jury took only an hour and forty minutes to go from a deadlock to four unanimous verdicts.

We do not know what actually happened in the jury room, but we cannot assume that the prosecutor's religious argument did not persuade at least one of the jurors to change a vote for life to death on the Marlene Wells count. The evidence in aggravation was countered with considerable mitigating evidence. That the jury deadlocked evenly after deliberating over three days exemplifies the difficulty of the sentencing decision.

The State argues that a finding of prejudice here would be out

of step with cases from our sister circuits that have considered similar prosecutorial argument to be harmless error. There is no discord, for the cases are very record-specific.

In *Bennett v. Angelone,* for example, the Fourth Circuit held that a prosecutor's religious argument was error, but that, in light of the total context of the trial, the error did not render the defendant's trial unfair. 92 F.3d at 1346. In that case, the prosecutor told the jury that " 'Thou shall [sic] not kill' is a proscription against an individual; it is not against Government. Because Government has a duty to protect its citizens." *Id.* (sic in original). The court found that religious arguments were improper but held that the prosecutor's comments did not deny the defendant due process because there was strong evidence of the defendant's guilt and eligibility for the death penalty. *See id.* In that case the defendant's guilt trial lasted one day and defense counsel put on no evidence. *See id.* at 1341. After the penalty phase, the jury took less than an hour to return a death sentence. *See id.* Sandoval's trial was considerably longer and more complex, with the jury deliberating for over three days before reaching a verdict.

In *Coe v. Bell,* the Sixth Circuit held that argument that the Bible condones capital punishment was inappropriate, but that it did not in and of itself constitute reversible error. 161 F.3d at 351. The court did not explain why, but we observe that the prosecutor in that case did not argue that the Bible commanded capital punishment for the defendant. *See id.*

***780** The First Circuit in *United States v. Giry,* held that the prosecutor's comparison of the defendant's testimony to "Peter who for the third time denied Christ" was improper, but that its prejudicial impact was significantly reduced by the trial judge's instructions and the strength of the evidence against the defendant. 818 F.2d at 132-34. *Giry* was not a capital case and defense counsel did not contemporaneously object to the

prosecutor's statements. *Id.* at 122-23, 133.

The prosecutor in this case, although reminding the jury on various occasions that its duty was to determine whether the evidence in aggravation substantially outweighed the mitigating evidence and to follow the trial court's instructions, clearly intended to appeal to religious authority and did so repeatedly. The prosecutor meant this argument to have an effect on the jury. We think it did. At a minimum, we have grave doubts about the harmlessness of the error and therefore grant relief. *See Jeffries v. Wood,* 114 F.3d 1484, 1489 (9th Cir.1997) (en banc) ("Where the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error, the error is not harmless and relief should be granted.").

DENIAL OF LEAVE TO AMEND

[24] We also have considered Sandoval's claim that the district court erred in denying his motion to vacate its order striking previously unexhausted claims from his habeas petition, or alternatively for an order granting leave to amend his petition to re-raise newly-exhausted claims. We have reviewed the record and find no abuse of discretion by the district court. *See Bonin v. Calderon,* 59 F.3d 815, 845-46 (9th Cir.1995).

CONCLUSION

We hold that the district court erred in concluding that Sandoval was prejudiced by the trial court's failure to sever the trial on the Marlene Wells murder count from the other counts in the indictment. Severance was not required. We also reject Sandoval's claim that his *Faretta* right to self- representation was improperly denied.

Because the prosecutor's religion-based closing argument

denied Sandoval a fair penalty phase trial, we remand the case to the district court with instructions to grant the petition for a writ of habeas corpus as to Sandoval's death sentence unless the State grants Sandoval a new penalty phase trial on the Marlene Wells count within 120 days of the district court's order. In light of our disposition of this issue, we need not address Sandoval's claim that the trial judge should have declared a mistrial after the jury deadlocked, or his claim that he was denied the effective assistance of counsel by his attorneys' failure to discover and present psychological evidence in mitigation at the penalty trial.

The judgment of the district court granting the writ as to Sandoval's conviction for Marlene Wells's murder is REVERSED. The district court's grant of the writ as to Sandoval's death sentence is AFFIRMED on the grounds of improper prosecutorial argument. The district court's judgment denying relief from Sandoval's other convictions and sentences is AFFIRMED. The case is REMANDED to the district court for entry of an appropriate order for a penalty phase retrial on the Marlene Wells count, if the State elects to seek such a retrial.

FISHER, Circuit Judge, dissenting in part:

I agree with all of the majority opinion, except its resolution of Sandoval's self-representation claim. I, too, believe that, by necessity, the Sixth Amendment right to self-representation is looked upon as the weaker corollary of the Sixth Amendment right to counsel. In this case, however, we are not called upon to determine whether this somewhat disfavored right was asserted in the first instance (thereby foregoing the all-important right to counsel); rather, we must decide whether Sandoval *waived* ***781** his constitutionally protected right of self-representation once it was asserted.

Even if waiver under such circumstances is accomplished more easily than is waiver of the otherwise self-executing right to counsel, a finding of waiver calls for a *fact-specific* inquiry. The cases relied upon by the majority teach us this lesson. For example, in *Brown v. Wainwright,* 665 F.2d 607 (Former 5th Cir.1982) (en banc), the defendant's Sixth Amendment claim was denied *after an evidentiary hearing* had been held and all of the facts had been considered by the district court. *See id.* at 616 (Garwood, J., concurring) ("I wish ... to emphasize that following an evidentiary hearing the federal district court has found on the basis of adequate evidence that Petitioner, after the requests and motion to represent himself were made and before any ruling thereon by the state trial judge, resolved his differences with his appointed counsel...."). Likewise, the Supreme Court, in *McKaskle v. Wiggins,* 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), denied the petitioner's Sixth Amendment claim only after conducting an exhaustive review of the trial transcripts, *see id.* at 180-87, 104 S.Ct. 944, and finding, on a factual basis, that "[t]he record ... reveal[ed] that [the petitioner's] pro se efforts were undermined primarily by his own, frequent changes of mind regarding counsel's role," *id.* at 182, 104 S.Ct. 944.

The problem in this case is that the facts are not as clear or developed as they were in the cases relied upon by the majority. The judge who denied Sandoval's motion was not the judge who first considered the motion and lectured Sandoval regarding the dangers of the route he was choosing. It appears from the record that the new judge was unaware of the motion and, of greater concern, the fact that Sandoval distrusted his counsel, *cf. Brown,* 665 F.2d at 612 ("In the present case, since there was no allegation by defendant that he did not trust his counsel or that counsel was incompetent, the judge had no reason to conclude counsel was misrepresenting defendant's views."). It also appears that Sandoval was unable to hear the representations made by counsel to the new judge at sidebar, so

he had no opportunity to correct those representations if they were inaccurate. In addition, Sandoval contends that he was told that his motion had been denied and that library privileges had been granted in light of that denial, *not* that counsel had presented the judge with both options and that the judge had chosen library privileges "to prevent another pro per," which is what really occurred. If all of these facts were to prove true, one can hardly fault Sandoval for failing to reassert his right to self-representation or to challenge the trial court's denial of his original motion.

I understand the majority's concern that we must avoid encouraging a defendant to waive his or her right to counsel. That being said, however, I see no reason to caution *against* direct discussion between a court and a defendant upon withdrawal of a *Faretta* motion. I suggest that the facts of this case (particularly the judge's unfamiliarity with the motion and Sandoval's expressed distrust of his counsel) warranted such a discussion to ensure that Sandoval had in fact waived his Sixth Amendment right to act as his own counsel. All of the uncertainty surrounding Sandoval's waiver could have been clarified by the trial court without much additional time or effort, simply by addressing Sandoval directly.

Nor, as the majority seems to suggest, is a direct colloquy the only way to ensure that a defendant's Sixth Amendment right of self-representation is accorded due respect under these circumstances. I would not be writing this dissent if, for example, counsel had stated in open court that Sandoval would be satisfied with library privileges and Sandoval failed to object to the accuracy of that statement when made. Under those circumstances, it would have been unnecessary for the trial court to address the defendant directly. In fact, even if the trial court simply had denied ***782** Sandoval's motion in open court following the discussion at sidebar, Sandoval would have been put on notice *on the record* of the basis for that denial and we

would be able to infer from his silence that counsel had accurately relayed his position. [FN1] Unfortunately, neither of these approaches was taken at Sandoval's hearing.

> FN1. I do not suggest the record indicates that Sandoval's counsel intended to mislead the trial court. It may be the case that counsel misunderstood Sandoval. Or perhaps Sandoval *was* satisfied with library privileges and the appeal of this issue amounts to much ado about nothing. This is the information I would expect an evidentiary hearing to develop.

We must also remember the posture of this issue on appeal. The district court denied Sandoval's Sixth Amendment claim by granting *judgment on the pleadings.* Because this is a pre-AEDPA case, we review de novo and Foster is entitled to relief if the trial court committed an error that had a substantial influence on the outcome of his trial. *See Lopez v. Thompson,* 202 F.3d 1110, 1116 (9th Cir.2000) (en banc). Under this standard, I believe the circumstances of Sandoval's waiver merited an evidentiary hearing. *Cf. Schell v. Witek,* 218 F.3d 1017, 1027 (9th Cir.2000) (en banc) ("Evidentiary hearings are particularly appropriate when claims raise facts that occurred ... off the record.").

For these reasons, I would remand for an evidentiary hearing. I therefore dissent from the majority's determination of Sandoval's self-representation claim.

APPENDIX M

FILED
MAR 12 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR ALFRED SANDOVAL,	)	Nos. 99-99010 99-99013
Petitioner-Appellee/ Cross-Appellant,	)	D.C. No. CV-94-08206-R
v.	)	ORDER
ARTHUR CALDERON, Warden of the California State Prison at San Quentin,	)	
Respondent-Appellant/ Cross-Appellee.	)	

BEFORE: SCHROEDER, Chief Judge

The unopposed motion for stay of the issuance of the mandate pending application for writ of certiorari is granted. Fed. R. App. P. 41 (b).

Therefore, it is ordered that the mandate is stayed pending the filing of the petition for writ of certiorari in the Supreme Court.

APPENDIX N

SUPREME COURT
FILED
JUL 28 19993
Robert Wandruff Clerk
Deputy

S026386

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

In RE ALFRED ARTHUR SANDOVAL On Habeas Corpus

Petition for Writ of Habeas Corpus DENIED on the merits.

Mosk, J. and Kennard, J. are of the opinion an order to show cause should issue.

LUCAS / S/
CHIEF JUSTICE

SUPREME COURT
FILED
OCT 21 1998
Robert Wandruff Clerk
Deputy

S057548

IN THE SUPREME COURT OF CALIFORNIA

IN RE ALFRED ARTHUR SANDOVAL
ON
HABEAS CORPUS

Petition for writ of habeas corpus denied on the merits. The following claims are also denied as untimely: claims I, II, III, IV and V. (*In re Clark* (1993) 5 Cal.4th 750, 782-787, 797-798; *In re Robbins* (1998) 18 Cal.4th 770, 814, fn. 34.) The following claims are also denied on the ground that they could have been, but were not, raised on appeal: claims II (except to the extent it alleges ineffective assistance of counsel), III, IV, and V. (*In re Harris* (1993) 5 Cal.4th 813, 825, fn. 3, & pp. 829-841; *In re Dixon* (1953) 41 Cal.2d 756, 759.)

Mosk, J., and Brown, J., would deny the petition solely on the merits.

GEORGE /S/
Chief Justice

APPENDIX O

IV.

THE DISTRICT COURT PROPERLY DENIED RELIEF ON PETITIONER'S CLAIM OF IMPROPER PROSECUTORIAL ARGUMENT

Petitioner claims the trial prosecutor's penalty phase argument improperly and prejudicially referred to biblical authority. Specifically, Petitioner argues the summation violated the general prohibition on the invocation of religious authority in argument. He further contends that the argument improperly minimized the jury's sense of responsibility for determining the appropriateness of condemnation. (AOAB 37-46.) Respondent disagrees and submits the District Court and California Supreme Court both properly found harmless any alleged error in the prosecutor's argument.

. . . . . .

Viewed contextually, the prosecutor's argument in this case did not render the proceedings fundamentally unfair. As in Boyd, the prosecutor's arguments responded, if not proportionally, to defense counsel's argument about the jurors "play[ing] God to an individual." Sandoval, 4 Cal. 4th at 191-93; RT 6501. As the Supreme Court has observed,

> the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. Thus, the import of the evaluation has been that if the prosecutor's remarks were `invited,' and did no more than respond substantially in order to "right the scale," such comments would not warrant reversing a conviction.

United States v. Young, 470 U.S. 1, 12-13 (1985).

In responding to the defense argument, this prosecutor repeatedly stressed that the jury should reach its verdict by weighing aggravating and mitigating circumstances. (See, e.g., RT 6514-15, 6527-28, 6533-34, 6546-47.) Indeed, in concluding his remarks, the prosecutor cautioned the jury that "[t]he bottom line here is whether or not the death penalty is appropriate based on whether the aggravation substantially outweighs the mitigation." (RT 6546-47.)

Additionally, the jurors returned their lone condemnation as to the most heinous of the four murders committed in this case -- the shooting of Marlene Wells, whom, the evidence suggested, and the District Court found, had no previous involvement with Petitioner and died simply because she had the misfortune of witnessing her husband's frightfully brutal killing. Marlene Wells' status as an innocent bystander was an entirely appropriate and rational basis for the imposition of petitioner's death sentence. Payne v. Tennessee, 501 U.S. at 823. Moreover, as the California Supreme Court pointed out, the jurors did not immediately return the death verdict in the wake of the prosecutor's argument but only after deliberating for over four days. Sandoval, 4 Cal. 4th at 194.

The state supreme court's ruling comports with the limited role of the Due Process clause in assessing prejudice:

> [T]he Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate fundamental fairness very narrowly . . . . Judges are not free, in defining due process, to impose on law enforcement officials [their] personal and private notions of fairness and to disregard the limits that bind judges in their judicial function . . . . [They] are to determine only whether the action

> complained of ... violates those fundamental conceptions of justice which lie at the base of our civil and political institutions . . . which define the community's sense of fair play and decency."

Dowling v. United States, 493 U.S. 342, 352-53 (1990)(internal quotations and citations omitted). Petitioner simply cannot demonstrate that the controverted argument undermined fundamental conceptions of justice.

ORIGINAL

No. 00-1774

Supreme Court, U.S.
FILED
JUN 25 2001
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner*

v.

ALFRED ARTHUR SANDOVAL, *Respondent.*

ON OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*
(SUPREME COURT RULES, RULE 39)

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RECEIVED
JUL 09 2001
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ORIGINAL

COMES NOW Respondent ALFRED ARTHUR SANDOVAL in the above-entitled matter and presents this motion for leave to proceed *in forma pauperis*. This motion is based on Supreme Court Rules, Rule 39, and is based on the following facts.

Respondent is an indigent death row inmate at the California State Prison at San Quentin, California. Respondent seeks to file in this Honorable Court a Brief in Opposition to the Petition for Writ of Certiorari submitted by Petitioner Calderon to the Court of Appeals for the Ninth Circuit, which issued its operative ruling in this case on February 21, 2001. On December 11, 1995, Respondent was assigned the appointed the counsel referenced below by the Honorable United States District Court Judge Manuel L. Real. Said appointment of counsel was made pursuant to 18 U.S.C. Section 3006A and Local Rule 26.8.4 of the United States District Court, Central District, California. Leave to proceed *in forma pauperis* has not been sought by Respondent in any other court. As Respondent was appointed counsel pursuant to federal statute, no affidavit or declaration accompanying this motion is required.

For the foregoing reasons, Respondent ALFRED ARTHUR SANDOVAL respectfully requests that this court grant his motion for leave to proceed *in forma pauperis*.

DATED: June 21, 2001.

LAW OFFICES OF MICHAEL S. MAGNUSON

By: _____
MICHAEL S. MAGNUSON, Attorney for
ALFRED ARTHUR SANDOVAL

LAW OFFICES OF MANUEL U. ARAUJO

By: _____
MANUEL U. ARAUJO, Attorney for
ALFRED ARTHUR SANDOVAL

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 13215 E. Penn Street, Suite 205, Whittier, California 90602. On June 22, 2001, I served the foregoing document(s) described as MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS on the interested parties in this action as follows:

____ **By FAX transmission**

_X_ **By placing** _____ the original _X_ a true copy thereof enclosed in sealed envelopes addressed as follows:

BILL LOCKYER
Attorney General of California
Jeffrey Kahan
Deputy Attorney General
300 S. Spring Street
Los Angeles, CA 90013

Alfred Sandoval
D#61000 2-AC-12
San Quentin Prison
San Quentin, CA 94974

Manuel U. Araujo, Esq.
8484 Wilshire Blvd., Suite 605
Beverly Hills, CA 90211

_X_ **BY MAIL:**

_X_ I deposited such envelope in the mail at Whittier, California. The envelope was mailed with postage thereon fully prepaid.

_X_ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U. S.Postal Service on that same day with postage thereon fully prepaid at Whittier, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after day of deposit for mailing in affidavit.

___ **BY PERSONAL SERVICE** -- I caused such envelope to be delivered by hand to the offices of the addressee. **Proof of Service** to be filed.

_X_ **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

__ **(Federal)** I declare that I am employed in the office of a member of the Bar of this court at whose direction the service was made.

SANDRA PEREZ
Name of Declarant

Signature of Declarant

Supreme Court, U.S.
FILED
JUN 23 2001
CLERK

No. 00-1774

IN THE SUPREME COURT OF THE UNITED STATES

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner*,

v.

ALFRED ARTHUR SANDOVAL, *Respondent*.

ON OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

QUESTIONS PRESENTED
CAPITAL CASE

1. Whether the Court of Appeals' definition of the term "pending case" to include habeas petitioners who have filed requests for appointment of counsel presents a sufficiently significant conflict with the decisions of other Circuits to merit certiorari, given the fact that the resolution of this issue: (a) is irrelevant to the ultimate outcome of this case, (b) affects a limited and diminishing number of cases, and (c) reflects still developing issues of law surrounding the interpretation of this Court's decision in *Hohn v. United States, 524 U.S. 236.*

2. Whether the Court of Appeals, applying post-AEDPA law, would have been required to defer to the State Court's determination of harmless error, where the prosecutor violated Petitioner's Eighth Amendment rights by invoking the authority of the Bible in arguing for death during the penalty phase of the trial.

List of Parties

The parties to this action are Petitioner Warden Arthur Calderon ("the Warden") and Respondent Alfred Arthur Sandoval ("Mr. Sandoval").

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent ALFRED ARTHUR SANDOVAL respectfully submits this brief in opposition to the Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit filed herein by petitioner, Arthur Calderon, Warden of the California State Prison at San Quentin.

I

STATEMENT OF THE CASE

Petitioner was arraigned in Los Angeles County Superior Court on July 8, 1985, charged with two counts of murder and a single count of attempted murder occurring on October 13, 1984 (the Belvedere Park Homicides) and two counts of murder occurring on October 31, 1984 (the Wells homicides). Trial commenced November 25, 1986. Guilty verdicts of first degree murder were returned as to the Belvedere Park shootings on February 12, 1987 and as to the Wells shootings on February 23, 1987, along with a multiple-murder special circumstance finding and one count of attempted murder.

The penalty phase of the trial commenced March 2, 1987. The jury began deliberations March 12, 1987. On March 18, the foreman advised the trial court that the jury was hopelessly deadlocked, reporting a split of six to six on counts 1 and 2 and five to seven on counts 3 and 4. The foreman stated that there was no reasonable possibility of arriving at a verdict through further deliberations. The court admonished the jury and instructed them to return the next day. The next morning, despite its previous unequivocal deadlock, the jury returned its verdicts of life without parole as to counts 1, 2 and 3, and a verdict of death as to count 4, the Marlene Wells conviction. On May 15, 1987, judgment was imposed and Petitioner was sentenced to death.

On December 14, 1992, the California Supreme Court affirmed the convictions and sentences. *People v. Sandoval, 4 Cal.4th 155 (1992).* Thereafter, the United States Supreme Court also affirmed. *Sandoval vs. California, 511 U.S. 1 (1994).* Petitioner also filed a petition for writ of habeas corpus with the California Supreme Court. That petition was denied "on the merits" July 7, 1993.

Petitioner filed a request for appointment of counsel and stay of execution in the United States District Court on December 7, 1994. A petition for writ of habeas corpus was filed in the United States District Court July 1, 1996, and an amended petition was filed July 29, 1996.

Thereafter, Respondent's motions for judgment on the pleadings and for partial summary judgment were granted as to various of the claims in the petition. The court held an evidentiary hearing on one claim, which was denied. On April 2, 1999, judgment was entered by the District Court granting in part and denying in part Mr. Sandoval's petition. The District court granted the writ with respect to claim 7 of the Petition, where Petitioner alleged that the Belvedere Park and Wells counts were improperly joined at trial.

The parties filed cross-appeals in the United States Court of Appeals for the Ninth Circuit. The Court of Appeals issued its original order November 6, 2000, and an amended order February 21, 2001. *Sandoval v. Calderon, 241 F.3d 765 (9th Cir. 2000).* The Appellate Court reversed the District Court's judgment granting the writ with respect to the severance issue, but affirmed the granting of the writ on the grounds of improper prosecutorial argument. both parties have filed petitions for writ of certiorari in the United States Supreme Court.

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II

SUMMARY OF REASONS FOR DENYING THE WRIT

The Ninth Circuit decision in *Calderon v. United Sates District Court (Kelly V), 163 F.3d 530 (9th Cir. 1998),* followed by the court in the instant case, does not create a sufficient conflict with the decisions of other Courts of Appeals on the applicability of the AEDPA that would merit certiorari. First, as discussed more fully below, the Court of Appeals' reasoning on this issue is irrelevant to the outcome of this case, since the court's decision would be the same even if post-AEDPA law applied. Second, this issue is not a matter of sufficient importance to merit review, since it affects a limited and rapidly decreasing number of habeas petitioners. Lastly, there is no immediate need for this court to exercise its certiorari jurisdiction to resolve any conflict, since the law on this issue is likely to further develop. Other Circuits should be afforded a similar opportunity to interpret the AEDPA in light of *Hohn v. United States, 524 U.S. 236 (1998).*

Even if post-AEDPA law is applied, the result in this case would be no different. Under the AEDPA a state determination may be set aside by the federal court where it is contrary to clearly established federal law as determined by the Supreme Court of the United States. Here, the California Supreme Court found that the prosecutor violated both the California and the United States Constitutions when, at the close of the penalty phase trial, he paraphrased from the Bible in arguing to the jury that the death penalty was sanctioned by God. While the state court concluded that the error was harmless, the Ninth Circuit held the argument to be both improper and highly prejudicial. In reaching its decision, the Court of Appeals specifically relied on well-established United States Supreme Court precedent.

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ARGUMENT

I

THE COURT OF APPEALS, BY APPLYING PRE-AEDPA LAW TO THIS CASE, DOES NOT CREATE A SUFFICIENT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS THAT WOULD MERIT CERTIORARI

A. The Issue Is Still Developing In the Courts of Appeal.

The court below held that Mr. Sandoval's original habeas petition was timely because, under *Calderon v. United States District Court (Kelly), supra, 163 F.3d 530, 540*, his request for appointment of counsel and application for stay of execution qualified as "case" that was pending at the time the AEDPA was enacted. *Kelly V* was based on the reasoning of *Hohn v. United States, supra., 524 U.S. 236*, in which the court concluded that a preliminary pleading filed in a court should be treated, for jurisdictional purposes, as an indivisible part of the overall "case" in that court. The Warden avers that a conflict now exists among the circuit courts with respect to whether an application for appointment of counsel pursuant to *21 U.S.C. § 848(q)* creates a pending case within the meaning of *Hohn*.

AEDPA's provisions for federal review of state prisoner petitions do not apply to cases that were pending prior to its effective date, April 24, 1996. See *Lindh v. Murphy, 521 U.S. 320, 327 (1997)*. The Ninth Circuit has held that the *Lindh* rule renders AEDPA inapplicable to cases in which an application for habeas corpus relief had not been filed on or before April 24, 1996, but in which an application for appointment of counsel under *21 U.S.C. § 848(q)* had been filed on or before that date. In *McFarland v. Scott, 512 U.S. 849 (1994)*, the Supreme Court concluded that "a

habeas corpus proceeding is pending," as that phrase is used in the stay provision of Chapter 153 of the habeas corpus statute, if a petition for habeas corpus relief has been filed before that date or if an indigent capital prisoner's application for appointment of counsel had been filed as of that date. There is no meaningful distinction between the "cases pending" language of *§ 107(c)*, which, as *Lindh* concluded, "implicitly" governs the applicability of the amendments to Chapter 153, and the "proceeding. . . pending" language of Chapter 153's stay provision that was interpreted in *McFarland*. Consequently, *McFarland's* conclusion that a habeas proceeding is pending when a capital prisoner's application for the mandatory appointment of counsel has been filed establishes that a habeas corpus "case" also is "pending" on that date.

Respondent acknowledges that several circuits have reached a conclusion contrary to the Ninth Circuit with respect to this issue. On February 12, 1999, the United States Court of Appeals for the Sixth Circuit decided *Williams v. Coyle, 167 F.3d 1036 (6th Cir. 1999)*. In *Williams*, the court held that a habeas case is not pending within the meaning of *Lindh* until the application for the writ is filed pursuant to *28 U.S.C. § 2242*. In rejecting the reasoning of the Ninth Circuit en banc court, the *Williams* panel relied in part on Sixth Circuit precedent that the "*McFarland* interpretation of 'pending'. . . extends no further than is necessary to give effect to *21 U.S.C. § 848(q)(4)B)*." As a result, the Sixth Circuit confined *Hohn* to its facts and limited its holding to a determination that the rejection by the District Court of a certificate of appealability constitutes an appealable order.

In *Moore v. Gibson, 195 F.3d 1152 (10th Cir. 1999)*, the court agreed with the Sixth Circuit's view in *Williams*, that a "case is pending under AEDPA only upon the filing of a petition for writ of habeas corpus" and that "filing of a request for counsel" does not suffice. Similarly, in *Gosier v. Welborn, 175 F.3d 504 (7th Cir. 1999)*, the court reaffirmed the Seventh Circuit's view that filing of

the petition, not the earlier application for appointment of counsel, determines applicability of AEDPA.

One of the prime purposes of certiorari jurisdiction is to bring about uniformity of decisions on matters among the federal courts of appeals. Hence, a square and irreconcilable conflict is usually needed to secure review. See *McElroy v. United States, 445 U.S. 642, 643 (1982)*; *Marks v. United States, 430 U.S. 188, 189 (1977)*. Moreover, to merit review the conflict must also be on an important issue. See *Robert L. Stern, Eugene Gressman, Steven M. Shapiro & Kenneth S. Geller, Supreme Court Practice, § 4.4 at 168 (7th Ed. 1993)*. Given the rapidly diminishing number of cases affected by the holding of the Ninth Circuit, this Court should decline to exercise its jurisdiction.

Finally, this Court usually permits tolerable conflicts to go unaddressed until several courts of appeal have considered a question. As a result, this Court should allow the issue to percolate through the lower courts before accepting it for review. See *McCray v. New York, 461 U.S. 961, 963 (1983)* (Stevens, J.) (certiorari denied when issue requires further study in lower courts before it is addressed by this Court); *Gilliard v. Mississippi, 464 U.S. 867 (1983)* (this Court should postpone consideration of the issue until more state supreme courts and federal circuits have experimented with substantive and procedural solutions to the problem). For that reason, the circuits should be permitted the opportunity to fully develop and adequately frame the issues sought to be resolved by this Court before the question is accepted for review.

B. The Decision of the Court Below is Correct and in Harmony with the Precedents of This Court.

As noted above, the Ninth Circuit analysis of this issue is based on this court's decision in *Hohn v. United States, 524 U.S. 236 (1998)*. The *Hohn* court held that the Supreme Court has

jurisdiction to review decisions of the Courts of Appeals denying applications for certificates of appealability under *28 U.S.C. § 2253(c)*. In reaching this narrow holding, this Court relied on its prior decision in *Ex Parte Quirin, 317 U.S. 1 (1942)*. Of particular relevance to the Court of Appeals was the following passage from *Hohn*:

> In *Ex Parte Quirin, 317 U.S. 1 (1942)*, we confronted the analogous question whether a request for leave to file a petition for writ of habeas corpus was a case in a district court. . . . We held the request for leave constituted a case in the district court over which the court of appeals could assert jurisdiction, even though the district court had denied the request.

In the wake of *Hohn* and specifically the *Kelly* Court's reliance on the holding of *Ex Parte Quirin*, that a threshold request for leave to file a petition for habeas corpus commences the habeas "case," ten judges of the en banc court found *Hohn*'s reasoning irreconcilable with its prior holdings in *Calderon v. United States District Court (Beeler), 182F.3d 1283 (9th Cir. 1997)* and *Kelly III*.

Regardless of the legal question posed, the word "case" means "a proceeding in court, a suit, or action." *Blyew v. United States, 80 U.S. 581, (1871)*. We must, as justice Holmes stated, "accept the plain meaning of plain words." *United States v. Brown, 206 U.S. 240, 244 (1907)*. In this context, the word "case" retains the same meaning, regardless of whether it is used to interpret a statute of limitations or a jurisdictional issue.

The court's recent decision in *Slack v. McDaniel, 120 S. Ct. 1595 (2000)*, reinforces the view that a pre-AEDPA application for appointment of counsel creates a "pending" case, even if the petition itself is filed after AEDPA's effective date. Under *Slack*, an application for a certificate of appealability commences an "appellate case" because it initiates "proceedings in the appellate

courts." *Id. at 1602*. Since an application for appointment of counsel similarly initiates proceedings in the district court, such a filing should be understood to commence a "case" in the district court for purposes of determining AEDPA's applicability to the district court proceedings.

The tie that binds *Hohn* and *Kelly V* is that neither an application for certificate of appealability nor a request for appointment of counsel should be regarded as threshold inquiries separate from the merits, but rather as judicial proceedings to resolve cases or controversies within the meaning of Article III of the Constitution. The assertion that a request for counsel and a stay lack adversity is without merit. Thus, the decision of the Court of Appeals, being indisputably in harmony with *Hohn*, leaves no special or important reason for this Court to review it under the standards of this Court.

II

THE RESULT IN THIS CASE WOULD BE NO DIFFERENT IF AEDPA RULES FOR FEDERAL REVIEW OF STATE COURT DECISIONS ARE APPLIED

The Warden argues that if AEDPA law had been applied to this case, the Court of Appeals would have been compelled to defer to the state court determination. The threshold question under AEDPA is whether a habeas petitioner seeks to apply a clearly established rule of federal law, as determined by the Supreme Court of the United States, at the time his state court conviction became final. There is no question that the Court of Appeals in the instant case did apply clearly established federal law as determined by the United States Supreme Court in concluding that the prosecutor violated Mr. Sandoval's Fifth Amendment rights when he paraphrased passages from the Bible's New Testament in arguing to the jury that the death penalty was sanctioned by God.

In his penalty phase opening statement, Petitioner's counsel asserted that imposition of the death penalty would not "change anything" nor "bring back Anthony Aceves and Gilbert Martinez and the two Wells." (RT 6152). He stated that the death penalty had one effect only — "bottom line is revenge . . . just pure and simple . . . vengeance." (*Ibid.*). Counsel concluded with a plea for a decision based on something other than vengeance:

"Gandhi said we do this eye for an eye thing, make society require it and do it, what happens is the whole world becomes blind. The light is shut out. That's not right. Don't shut out the light. Don't make the world blind. Don't push that button." (RT 6513).

The prosecutor responded to defense counsel by asking for death. In the course of argument, he stated as follows:

> "Defense counsel says don't play God. 'Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of a fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same . . . But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an avenger who brings wrath upon one who practices evil.'
>
> "You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right . . .
>
> ". . . Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."
>
> Ms. Kopple: "I'm going to object to these references, your Honor, and ask to approach the bench."
>
> The Court: "Request denied." (RT 6539-6540).

It is well settled that religion may not play a role in the penalty determination process. *United States v. Givy, 818 F.2d 120 (1st Cir. 1987)* (reference to the Bible is improper appeal to jurors' private religious beliefs); *Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987)* (biblical evidence irrelevant at sentencing phase). In *Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga. 1989),* the district court granted a petition for writ of habeas corpus, finding constitutional error where the trial court permitted a Bible to go into the jury room at the request of the jurors. The court stated:

> "A search for the command of extrajudicial 'law' from any source other than the trial judge, no matter how well intentioned, is not permitted. The use by deliberating jurors of an extrajudicial code (not already embodied in their own characters) cannot be reconciled with the Eighth Amendment's requirement that any decision to impose death must be the result of discretion which is carefully and narrowly channeled and circumscribed by the secular law of the jurisdiction." *Id. at 1559.*

A prosecutor violates the Constitution when he seeks to "minimize the jury's sense of responsibility for determining the appropriateness of death." *Caldwell v. Mississippi, 472 U.S. 320 (1985).* See also *Darden v. Wainwright, 477 U.S. 168 (1986).* *Caldwell* reversed a death sentence where the prosecutor's argument diminished the jury's sense of responsibility and undermined the reliability requirement of the Eighth Amendment by telling the jurors that their penalty decision was not, in effect, the final one and would be reviewed for correctness by appellate courts. In the instant case, the focus of the prosecutor's argument was precisely that type of diminution of juror authority condemned in *Caldwell*. Here, the prosecutor asked the jury to rely on the extrajudicial law of the New Testament. The portion of the Bible paraphrased by the prosecutor was Romans 13:1-7. The passage also contains Paul's assertion that the "sword of the state" could legitimately be wielded under divine authority against simple lawbreakers. The danger that a jury would be influenced by

this argument is obvious: "[t]o the average juror, . . the Bible is an authoritative religious document . . ." *Jones v. Kemp, supra at 1559.*

Ignoring the foregoing authorities, the Warden asserts that the prosecutor's improper argument did not violate a clearly established rule of federal law as determined by the Supreme Court. In *Williams v. Taylor, 120 S. Ct. 1479 (2000)*, the court provided an authoritative example of a state court ruling found to be "contrary to" Supreme Court law. There, the court majority held that the Virginia Supreme Court's analysis of petitioner's ineffective assistance of counsel claim "contrary to" the court's established precedent. Justice Stevens, speaking for the majority, stated:

> "It is past question that the rule set forth in *Strickland* qualifies as 'clearly established federal law, as determined by the Supreme Court of the United States' for purposes of 2254(d)(1)–and, therefore, does not qualify as a 'new rule' for *Teague* purposes–even when. . .the facts of the ineffective assistance claim before the habeas corpus court are materially different from those in *Strickland* itself."

In a decision issued shortly after *Williams*, *Ramdass v. Angelone, 120 S. Ct. 2113 (2000)*, the court described the *Williams* decision as establishing that a state court determination may be set aside under clearly established federal law where the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled. Thus, a decision need not explicitly articulate a rule in order to "clearly establish" that rule. Certainly the concept of "clearly established law" encompasses rules governing mixed questions of fact and law, even though these rules involve case by case application of the legal standard to the particularized factual context before the court.

Here, the California Supreme Court itself recognized that the prosecutor's argument violated the California and the United States Constitutions. Indeed, the State Supreme Court has frequently

recognized that an appeal to religious authority in support of the death penalty is improper because it tends to diminish the jury's personal sense of responsibility for the verdict and because such arguments carry the potential the jury will believe a higher law should be applied and ignore the trial court's instructions. See *People v. Wrest 3 Cal.4th 1088 (1992)*, and cases cited therein. However, the Sandoval court found "no reasonable possibility that the jury would have reached more favorable verdicts had the misconduct not occurred." *People v. Sandoval, supra, 4 Cal.4th at 194.* In doing so, the court relied on both state law and the federal test established by *Chapman v. Californian, 386 U.S. 18 (1968).* (before a federal constitutional error can be held harmless the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt).

The Ninth Circuit specifically relied on United States Supreme Court authority in its analysis rejecting the conclusion of the state court. *Godfrey v. Georgia, 446 U.S. 420, 428 (1980)*, is cited for the principle that under the Eighth Amendment, the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on specific factors it is to consider in reaching a verdict. "The biblical concepts of vengeance invoked by the prosecution here do not recognize such a refined approach." *Sandoval v. Calderon, supra, 241 F.3d at 776.*

Moreover, the Court of Appeals relied on *Caldwell v. Mississippi, 472 U.S. 320, 330-34 (1985)*, the seminal case disapproving of an argument tending to transfer the jury's sense of sentencing responsibility to a higher court. "A fortiori, delegation of the ultimate responsibility for imposing a sentence to divine authority undermines the jury's role in the sentencing process." *Id. at 777.*

Finally, the court invoked *Brecht v. Abrahamson, 507 U.S. 619 (1993)*, in its harmless error analysis, stating, "To warrant habeas relief, Sandoval must show that the prosecutor's improper argument 'had [a] substantial and injurious effect or influencing determining the jury's verdict.'" The court concluded: "The prosecutor's allusion to Scripture must have prejudiced Sandoval's chances of receiving life without possibility of parole instead of the death penalty." *Id. at 779.*

Thus, the approach taken by the Ninth Circuit is consistent with the statutory language of the AEDPA as explained in *Williams v. Taylor*, *supra*, and *Ramdass v. Angelone*, *supra*. The federal constitutional principles under which the Ninth Circuit ruled are well-established by the United States Supreme Court.

CONCLUSION

The Warden's certiorari petition raises no meritorious issues for review. The *Kelly V* decision correctly applied this Court's recent decision in *Hohn v. United States* to conclude that a habeas petition is not governed by the AEDPA where federal habeas counsel was appointed to file the petition prior to enactment of that statute.

The Warden's allegation that *Kelly V* creates a conflict with the decisions of other Circuits that justifies certiorari, lacks merit. This issue is irrelevant to the ultimate outcome of this case, since the court's resolution of the issue would be no different under AEDPA. The Ninth Circuit decision is founded on rules of federal law as determined by the United States Supreme Court–the AEDPA standard of review. Nor is the issue of sufficient importance to justify certiorari, since it affects a limited and diminishing number of habeas petitioners. Finally, this issue does not merit certiorari, since the law on this issue is still developing in light of this Court's recent decision in *Hohn v. United States*.

For all these reasons, the Warden's Petition for Writ of Certiorari should be denied.

DATED: June 21, 2001.

LAW OFFICES OF MICHAEL S. MAGNUSON

By: _____
MICHEL S. MAGNUSON, Attorney for
Respondent ALFRED ARTHUR SANDOVAL

DATED: June 21, 2001.

LAW OFFICES OF MANUEL U. ARAUJO

By: _____
MANUEL U. ARAUJO, Attorney for
Respondent ALFRED ARTHUR SANDOVAL

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 13215 E. Penn Street, Suite 205, Whittier, California 90602. On June 22, 2001, I served the foregoing document(s) described as OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the interested parties in this action as follows:

____ **By FAX transmission**

_X_ **By placing** _____ the original _X_ a true copy thereof enclosed in sealed envelopes addressed as follows:

BILL LOCKYER
Attorney General of California
Jeffrey Kahan
Deputy Attorney General
300 S. Spring Street
Los Angeles, CA 90013

Alfred Sandoval
D#61000 2-AC-12
San Quentin Prison
San Quentin, CA 94974

Manuel U. Araujo, Esq.
8484 Wilshire Blvd., Suite 605
Beverly Hills, CA 90211

_X_ **BY MAIL:**

_X_ I deposited such envelope in the mail at Whittier, California. The envelope was mailed with postage thereon fully prepaid.

_X_ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U. S.Postal Service on that same day with postage thereon fully prepaid at Whittier, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after day of deposit for mailing in affidavit.

___ **BY PERSONAL SERVICE** -- I caused such envelope to be delivered by hand to the offices of the addressee. **Proof of Service** to be filed.

_X_ **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

__ **(Federal)** I declare that I am employed in the office of a member of the Bar of this court at whose direction the service was made.

SANDRA PEREZ
Name of Declarant

Signature of Declarant